SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY, PETITIONER

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

I

A [File endorsement omitted.]

In United States District Court for the District of Columbia

Holding a Criminal Term

Grand Jury Impanelled March 1, 1954, Sworn in on March 2, 1954

Criminal No. 843–'54. Grand Jury No. 472–54.

Rape (22 D. C. C. 2801).

THE UNITED STATES OF AMERICA

v.

ANDREW R. MALLORY

Indictment

(Filed May 3, 1954)

The Grand Jury charges:

On or about April 7, 1954, within the District of Columbia, Andrew R. Mallory had carnal knowledge of a female named Stella R. O'Keane forcibly and against her will.

LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

A true bill:

STEPHEN T. PORTER,
Foreman.

[File endorsement omitted.]

[Title omitted.]

In the United States District Court for the District of Columbia

Arraignment and plea of defendant

(Filed May 14, 1954)

On this 14th day of May, 1954, the defendant Andrew R. Mallory, appearing in proper person and by his attorney William B. Bryant, Esquire, being arraigned in open Court upon the indictment, the same being read to him, pleads not

guilty thereto. The defendant is remanded to the District of Columbia Jail.

By direction of:

EDWARD M. CURRAN,
Presiding Judge,
Criminal Court Number 4.
HARRY M. HULL,
Clerk.
By C. J. RUMSEY,
Deputy Clerk.

Present: United States Attorney.

By JOHN DOYLE,
Assistant United States Attorney.
T. DORAN,
Official Reporter.

C In United States District Court

Sumary of Psychiatric Findings in the Case of Andrew Mallory. (C, M, Single, 19 Years)

(Filed July 14, 1954)
July 12, 1954

This subject was examined in the District Jail on July 5, 1954. He was vague, preoccupied and had a tendency to stare off to the right. The interview, more or less verbatim, was as follows:

"My lawyer says I pleaded guilty to rape."

(Is this why you're in jail?)

"I don't know."

(How long have you been in jail?)

"I don't know."

(A day?)

"I don't know."

(A week?)

"I don't know."

(A month?)

"About."

(When were you arrested?)

"I don't know."

(Street address?) The subject reached into his pocket, then said: "I don't remember," and then, after a moment, said: "In the Southwest."

(With whom did you live?)

"My brother Luther, his wife and children. I guess four."

(How long did you live with them?)

"I don't know. Have you some aspirin? I have a headache."

(Do you often have headaches?)

"Yes. Here."—pointing to frontal region . . . "Practically all the time . . . ever since I can remember."

(What is that on your forehead (a sebaceous cyst)?

"I don't know."

D (Where were you born?)

"In South Carolina—Speidenberg"—or a word sounding like this—"I don't remember." At this point, he turned his head as if listening.

(Do you hear voices?)

"Yes. They say I raped that woman."

(How long have you heard voices?)

"Here. Lately."

(Are your father and mother living?)

"Yes. I guess."

(Where?)

"I don't know."

(Do you have any sisters?)

"Yes . . . ten."

(Their names?)

"I don't remember. Do you have a cigarette?"

At frequent intervals during the interview he would sit and stare to the right as if listening. Questions would have to be repeated. He became increasingly tense.

(How far did you go in school?)

"Eighth grade."

(How did you do?)

"Did good. Do you have a cigarette?"

(Nine times nine?)

"My head hurts. I don't know."

(Five times five?)

Shook his head, meaning 'I don't know.'

(Two plus two?)

"Four."

(Four plus four?)

"Eight."

E (Four times four?)
"Sixteen."
(President of the United States?)
No response.
A long period of silence followed, during which he stared off to the right and picked at right index finger with his thumb.
(What are you thinking about?)
"I want a cigarette." Another long period of silence. "Why did they send you down here? Why do they think I need a psychiatrist?" Following these remarks, he made some unintelligible comments and walked out of the room.

Opinion

It is my opinion that this subject is suffering from an acute schizophrenic reaction with mixed catatonic and paranoid features. Information available to me at the present time is not adequate to offer an opinion as to whether or not the subject man was mentally ill at the time of the commission of his offense. At the present time, however, he is mentally ill and it is recommended that he be sent to a hospital for further observation and treatment.

John R. Cavanagh, M. D.
JOHN R. CAVANAGH, M. D.

F [File endorsement omitted.]

In United States District Court

Letter report

Filed July 16, 1954

JOSEPH M. ROM, M. D.
2025 EYE STREET, N. W.
Washington 6, D. C., July 13, 1954.

Judge DAVID A. PINE,
United States District Court,
Washington 1, D. C.

DEAR JUDGE PINE: This report relates to Andrew R. Mallory, upon whom I performed a psychiatric examination on July 7, 1954 in accordance with your court order criminal number 543–54, dated June 29, 1954.

My examination discloses the fact that the defendant is of unsound mind. He is suffering from a mental disease diag-

nosed as simple schizophrenia with mental deficiency. In my opinion, he is incapable of understanding the proceedings against him or to assist properly in his own defense.

I base my opinion upon the following findings in my examination. The patient appeared to be dull, apathetic, and mildly confused. No formal psychological tests were given, but I estimate that his intelligence is that of a moron. His memory is defective as indicated by his inability to remember a simple number span. His intellectual content was low as evidenced by his inability to comment upon simple current happenings. His replies were monosyllabic, indicating a low conceptional capacity. Most significantly, he reported auditory hallucinations. He complained of clear voices calling to him that he has raped a woman. I believe that he is too stupid to simulate such an important psychiatric finding.

In casual references to the electric chair, he indicates that his emotions are not in harmony with his present situation. His behavior in confinement is reported to be not that of a person in an extremely serious predicament.

Very truly yours,

J. M. Rom,
JOSEPH M. ROM, M. D.

G [File endorsement omitted.]

In United States District Court

Letter report

(Filed March 2, 1955)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SAINT ELIZABETHS HOSPITAL,
Washington 20, D. C.

Re: Andrew R. Mallory, February 24, 1955.

CLERK,
United States District Court for the District of Columbia,
Washington 1, D. C.

DEAR SIR: On December 9, 1954 Andrew R. Mallory, Criminal Number 543–54, was admitted to Saint Elizabeths Hospital for a period not to exceed ninety days upon an order of Judge Schweinhaut of the United States District Court for the

District of Columbia. It was, further, ordered that Mr. Mallory be examined by qualified psychiatrists attached to the staff of Saint Elizabeths Hospital in order to determine whether he is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense; and that reports of the examination should be filed with the Court including statements of the conclusions as a result of said examinations.

Mr. Mallory has been under observation at Saint Elizabeths Hospital since December 9, 1954, and has been examined by several qualified psychiatrists on the medical staff of Saint Elizabeths Hospital. As the result of these examinations we conclude that Andrew R. Mallory is mentally competent to understand the proceedings against him and properly assist in his own defense.

Sincerely yours,

Addison M. Duval,
ADDISON M. DUVAL, M. D.,
Acting Superintendent.

CC: United States Attorney for the District of Columbia, Washington 1, D. C.
Comm. issued 3/2/54. CJR.

H [File endorsement omitted.]

In United States District Court

Letter report

(Filed June 14, 1955)

WILLIAM G. CUSHARD, M. D.,
3201 Leland St., Chevy Chase 15, Md., June 11, 1955.

Andrew R. Mallory. No. 543–54.

The Clerk,
United States District Court for the District of Columbia
Washington, D. C.

DEAR SIR: In compliance with an order of the United States District Court for the District of Columbia, signed by Judge McGarraghy, I examined Andrew R. Mallory (Cr. No. 543–54) at the District of Columbia Jail on May 24, 1955.

As the result of my examination I conclude that Andrew R. Mallory is of sound mind, mentally competent to understand the proceedings against him, and to properly assist in his own defense.

Sincerely,

W. G. Cushard, M. D.
W. G. CUSHARD, M. D.

I [File endorsement omitted.]

In United States District Court

Letter report

Filed June 14, 1955

LEON J. EPSTEIN, M. D.
2601 Woodley Place, N. W., Washington, D. C.

Re: Andrew Mallory, Criminal No. 543–54, June 13, 1955.

Clerk,
United States District Court for the District of Columbia,
United States Court House,
Washington 1, D. C.

DEAR SIR: In compliance with an order for mental examination signed by Judge Joseph C. McGarraghy and dated May 17, 1955, I examined Andrew R. Mallory at the District of Columbia Jail on May 24, 1955.

It is my opinion as the result of my examination that Andrew R. Mallory is not psychotic at the present time and is so mentally competent as to be able to understand the proceedings against him and properly assist in his own defense.

Very truly yours,

Leon J. Epstein, M. D.,
LEON J. EPSTEIN, M. D.

[File endorsement omitted.]

In United States District Court for the District of Columbia

UNITED STATES

vs.

ANDREW R. MALLORY, *Defendant*

Criminal No. 543–54. Charge Rape

Adjudication of competency to stand trial—

(June 21, 1955)

On this 21st day of June, 1955, came the attorney of the United States; the respondent in proper person and by his attorneys, William B. Bryant and William A. Tinney, Jr., Esquire; whereupon an inquiry by the Court is begun to determine whether or not the respondent is of sound or unsound mind.

It is adjudged by the Court that the respondent is of sound mind and capable of standing trial.

By direction of:

ALEXANDER HOLTZOFF,
Presiding Judge Criminal Court No. 4.
HARRY M. HULL,
Clerk.
By DANIEL J. MENCOBONI,
Deputy Clerk.

Present: United States District Attorney.
By ARTHUR MCLAUGHLIN,
Assistant United States Attorney.
EVELYN SWEENEY,
Official Reporter.

In United States District Court for the District of Columbia

Criminal No. 543–54

UNITED STATES OF AMERICA,

v.

ANDREW R. MALLORY, DEFENDANT

Transcript of Proceedings

WASHINGTON, D. C.,
Tuesday, June 21, 1955.

The above-entitled action came on for trial before the Honorable Alexander Holtzoff, United States District Judge, and a jury, at 10:00 o'clock a. m.

APPEARANCES

On behalf of the United States: Arthur J. McLaughlin, Assistant United States Attorney.

On behalf of the defendant: William B. Bryant, Esq., and William A. Tinney, Jr., Esq.

* * * * *

The COURT. Let the record show that this hearing is being conducted in the absence of the jury.

Thereupon, WILLIAM G. CUSHARD was called as a witness by the United States and, being first sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Now, Doctor, your full name is what?
A. William G. Cushard, C-u-s-h-a-r-d.
Q. And you are a medical doctor, are you?
A. I am.
Q. Connected with what hospital in town here?
A. Saint Elizabeths Hospital.
Q. Do you specialize in any branch of medicine?
A. I do. In the treatment of nervous and mental diseases, psychiatry.

The COURT. I suggest you speak a little louder.

The WITNESS. Yes, sir. In the treatment of nervous and mental diseases, psychiatry.

By Mr. McLAUGHLIN:

Q. How long have you specialized in that branch of medicine, Doctor?

A. Since 1929.

Q. How long have you been connected with Saint Elizabeths Hospital?

A. Since 1929, same date.

24 The COURT. I think the witness is sufficiently qualified. I don't suppose his qualifications will be questioned.

Mr. BRYANT. No, Your Honor.

By Mr. McLAUGHLIN:

Q. Now, Doctor, at the request of the Court did you have an occasion to examine Andrew Mallory, the defendant here?

A. I did.

Q. When was the last time that you saw the defendant?

A. On May 24, 1955.

Q. What did that examination consist of, Doctor?

A. I examined Mr. Mallory at the District of Columbia Jail for a period of approximately one hour and ten minutes. As a matter of fact, exactly one hour and ten minutes. During that time he was questioned regarding his condition and given the opportunity to make any statement that he wished to make after he had first been informed that the examination was being conducted at the request of this Court.

Q. As a result of that examination, Doctor, did you come to any conclusion?

A. I did.

Q. Are you able to say at this time whether or not the defendant is competent to stand trial of the charges that are pending against him?

A. It is my opinion that he is competent to under-
25 stand the charges and to stand trial and to participate in his defense.

Mr. McLAUGHLIN. I believe that is all.

Cross-examination by Mr. BRYANT:

Q. Doctor, you made no inquiry at the jail about his behavior, did you?

A. I don't believe, to the best of my recollection, that we did. We examined him and he mentioned that he had had some difficulties himself.

Q. Did you follow up on that information you received from him?

A. I don't think I did; no, sir. It was merely his statement.

Q. And you of course knew that the reason he was being examined was because there was some question as to whether or not he knew the nature of the charges and was able to cooperate in his defense, is that so?

A. Yes, I do.

Q. Now, in that connection, Doctor, did you discover anything relative to the defendant and his present situation in terms of counsel?

A. I wonder if you could be a little more specific? I want to be sure I understand.

Q. Did you find out anything as a result of your
26 examination which relates to this man's relationship with counsel?

A. Yes. In the sense that he doesn't trust anyone very much, including counsel. I mean, that's a general distrust of apparently practically everyone with whom he comes in contact.

Q. Is there any special feeling directed to counsel? Did you detect any such thing?

A. I wouldn't say that it was a special feeling, no. He is just the type of person who doesn't trust anyone very much, and apparently that extends to counsel, physicians and others with whom he comes in contact.

MR. BRYANT. I have no further questions, Your Honor.

Mr. MCLAUGHLIN. I have nothing further.

The COURT. Anything further?

Mr. MCLAUGHLIN. No. Does Your Honor care to ask him any questions?

By the COURT:

Q. Doctor, you examined this man, I gather, on prior occasions also?

A. I had known him, Your Honor, during his hospitalization at Saint Elizabeths Hospital; yes.

Q. During what period was he in Saint Elizabeths Hospital?

27 A. If I may refer to some notes?

Q. Surely.

A. He was admitted to Saint Elizabeths Hospital on December 9, 1954, and remained there until March 2 1955, at which

time he had been reported to this Court as competent to go to trial.

Q. During the period that he was in Saint Elizabeths Hospital, was he found to be of unsound mind at any time? In other words, what I am trying to ascertain, is this a case where the physicians at Saint Elizabeths Hospital found that the defendant was of unsound mind and then he recovered his sanity, or did they find that he was of sound mind all along?

A. The diagnosis was "Without mental disorder" while he was at Saint Elizabeths Hospital. In other words, he was not found to be psychotic during his period at Saint Elizabeths.

Q. In other words, when he was committed for examination at Saint Elizabeths Hospital he was found to be of sound mind at that time?

A. During his entire residence at Saint Elizabeths Hospital, from December 9, 1954, to March 2, 1955, that is correct.

Q. I would like to know why, then, it took three months to reach the conclusion. There is no implied criticism in that question. I just want to know the facts.

28 A. Yes.

Mr. McLaughlin. May I explain that, your Honor?

The Court. Yes, indeed.

Mr. McLaughlin. Your Honor, we originally had a Gunther hearing in this case before Judge Schweinhaut, and two other doctors testified in that hearing. Judge Schweinhaut, after hearing it, wasn't satisfied with the testimony, and he ordered a further examination of this defendant. As a result of that he was sent to Saint Elizabeths where the doctors saw him.

The Court. No. I am just wondering why it took three months to reach the conclusion.

The Witness. He was committed to Saint Elizabeths Hospital for a period of 90 days, or not to exceed 90 days, for observation and examination.

By the Court:

Q. I see.

A. Actually in many of these cases, particularly where there seems to be some doubt as to mental capacity, we feel it is better to observe them, certainly in my opinion, for a minimum of 60 days, between 60 and 90 days. That is particularly important where there has been a valid question raised as to competency, which there was in this case.

The Court. Very well. That satisfies the Court.

Mr. BRYANT. May I ask him just one question?
29 The COURT. Yes, indeed.

By Mr. BRYANT:

Q. Doctor, when you had him under your observation, were you aware of the fact that the other two doctors, Dr. Rom and Dr. Cavanagh had found him to be of unsound mind?

A. Yes, I was.

Q. Was that the reason you had some doubt in your mind about him when he came there?

A. Well, I don't exactly use the word "doubt," but after all the man had been found by two doctors, at least in their opinion, to be of unsound mind. Therefore, we felt that he should be given careful and reasonably lengthy study.

Mr. BRYANT. All right, sir.

The COURT. You may step down.

(The witness left the stand.)

Mr. MCLAUGHLIN. Dr. Epstein.

May Dr. Cushard be excused?

The COURT. Yes.

Thereupon, LEON JOSEPH EPSTEIN was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Doctor, your full name is what?
30 A. Leon Joseph Epstein, E-p-s-t-e-i-n.

Q. And you are a medical doctor, are you not?

Mr. BRYANT. Your Honor, I concede Dr. Epstein's qualifications.

The COURT. Thank you.

By Mr. MCLAUGHLIN:

Q. Doctor, did you have an occasion to examine one Andrew Mallory?

A. I did, sir.

Q. When did you last examine him, Doctor?

A. I last examined him on May 24th of this year.

Q. 1955?

A. Yes.

Q. As a result of that examination, did you come to any conclusions?

A. I did.

Q. Would you say that the defendant at this time is competent to stand trial?

A. In my opinion he is.

Q. Does he know the charges? That is, is he able to confer with the attorneys in preparation for his defense in this case?

A. In my opinion he is.

Mr. McLaughlin. You may examine.

31 Cross-examination by Mr. Bryant:

Q. Doctor, you say that in your opinion he is able to confer with his counsel?

A. Yes, sir.

Q. In your opinion, Doctor—do you have an opinion as to whether or not he will or has conferred with his present counsel?

A. You are asking me do I have an opinion as to whether he has conferred or will confer with his counsel?

Q. That is right, sir, his present counsel. Myself, I am talking about.

A. Yes, sir. He evidenced the same sort of doubt and suspicion with respect to yourself as he does with people in general, and tends to assign blame for any predicament he is in or has been in to someone else. He does not do this to the extent that it would be considered part of a severe mental illness, although his amount of suspicion is somewhat more than usual. To that extent it would present some impediment to him fully placing you in his trust. I would say that perhaps that has occurred to some extent.

The Court. Isn't it a fact that some perfectly normal individuals, but who happen to be ignorant, sometimes mistrust their counsel?

The Witness. That is quite right, Your Honor. In
32 this particular situation I pointed out that this was so with Mr. Mallory more than one might find usually, but not to the extent one sees in paranoid mental illnesses.

Mr. Bryant. That's all.

By the Court:

Q. Doctor, you have had prior occasions to examine this defendant, have you, occasions prior to May 24th?

A. I did, during his hospitalization at Saint Elizabeths Hospital, for a period of 90 days.

Q. Was he under your care in Saint Elizabeths?

A. I was one of the physicians in the psychiatric service where he was hospitalized during this period.

Q. Did you find him mentally ill or of unsound mind during any part of that period?

A. I did not find him so.

Q. In other words, is it your opinion that he was of sound mind at the time he was committed for examination?

A. I believe he was. If I may change that, sir—during his hospitalization, that is from the time I first saw him, prior to that you say, at the time of his commitment in court I couldn't say.

Q. But how soon after his commitment did you first see him?

A. I make an attempt to see a person the day of his arrival in the hospital.

33 Q. Then you saw him on the day of his arrival at the hospital, and at that time he was sane, is that correct?

A. I saw no evidence of severe mental impairment or psychosis.

Q. Is there some mental abnormality? You say there is no severe mental abnormality. Is there some——

A. I would certainly say he is not as well put together from a personality standpoint as one might expect to find. And in the way he responds to stress, and the way he handles himself, of his problems in his everyday living. But I would not say this is present to the degree where I would call it a mental illness.

Q. In other words, he is not psychotic?

A. He is not psychotic.

Q. Would you say he is a psychopath?

A. He shows many of the characteristics of a psychopath. I would say he is.

Q. But a psychopath is competent to consult with counsel and make his defense if there is no psychotic elements, is that correct?

A. That is correct. If there is no psychotic element or if he does not also have a severe incapacitating psychoneurosis.

The COURT. Anything further?

Mr. MCLAUGHLIN: I have nothing further.

34 The COURT. You may step down.

The WITNESS. Am I excused?

The COURT. Both doctors may be excused.

(The witness left the stand.)

Mr. McLAUGHLIN. That's all we have on this.

The COURT. Does the defense wish to introduce any testimony on this issue?

Mr. BRYANT. If Your Honor please, I have none except the two doctors. They were appointed by the Court, and I have no professional testimony nor any lay testimony, if Your Honor please.

Both sides rest

The COURT. Very well. Both sides rest, then, on this issue?

Mr. McLAUGHLIN. Yes.

The COURT. The Court finds the defendant of sound mind and competent to stand trial.

* * * * *

45 STELLA R. O'KEANE was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. On April 7th of 1954, where did you live?

A. At 1223 12th Street, Northwest.

Q. Is that in the District of Columbia?

A. Yes, it is.

Q. Who did you live with at those premises?

A. With my husband, Mr. O'Keane.

Q. What apartment did you occupy in that apartment house?

A. 26.

Q. Apartment 26?

A. Yes.

Q. And apartment 26 is located on what floor?

46 A. The second floor.

Q. On April 7th of 1954, did you work that day?

A. Yes; I did.

Q. Where did you work?

A. At Woodward & Lothrop.

Q. All right. What time did you arrive home at that apartment?

A. Around 4:30 in the afternoon.

Q. When you arrived at 4:30 in the afternoon—is that right?

A. Pardon?

Q. You arrived home about 4:30?

A. Yes.

Q. On that particular day, after arriving home at 4:30 did there come a time when you saw your husband?

A. Yes. He came home from work around 5:30 and we had dinner.

Q. All right. What time would you say that you had completed dinner?

A. I had completed dinner around twenty till six in the evening.

Q. At the time that you had completed dinner, did you go any place after that?

A. I went down into the basement to wash clothes.

Q. At the time you went down in the basement to
47 wash clothes, what time would you say that was?

A. That was around about ten till six.

Q. Ten minutes to six?

A. Yes.

Q. When you went downstairs in the basement, did anyone go with you?

A. My husband carried the clothes down for me.

Q. How did he carry the clothes? What I mean by that, were they in a container?

A. They were in a clothes basket; yes, sir.

Q. At the time that you and your husband went downstairs with the laundry, how were you dressed?

A. I was in shorts and a blouse.

Q. What color were the shorts?

A. The shorts were Navy blue.

Q. All right. Did you have anything else on besides the shorts and the blouse?

A. I had my panties on.

The COURT. Your what?

The WITNESS. My panties.

By Mr. MCLAUGHLIN:

Q. When you arrived down in the basement, did your husband stay there with you?

A. He stayed long enough to get the washer out of the locker room and pull it out.

48 Q. The washer?

A. Yes.

Q. What do you mean by the washer?

A. Well, we had our own washer at the time, that we had in the locker room.

Q. You mean the washing machine?

A. Yes, the washing machine.

Q. After he did that, where did he go?

A. He went back upstairs to our apartment.

Q. After your husband went back upstairs, what did you do down in the basement?

A. Well, there was a big hose connected on to the spigot, and I couldn't get the hose off because it had been screwed on too tight. So I knocked on the janitor's door.

Q. Where is the janitor's door?

A. Well, the sinks were here [indicating] and the door was off to the—over that way.

Q. What did you do?

A. I knocked on the door and waited and then someone came out and I asked him would he please try to take the hose off the spigot so I could connect my hose on to put the water in the tubs.

Q. When you told the individual then, what did you do or where did you go?

A. Well, I was standing on this side of the washer,
49 and he was on the other side leaning over the sinks. I was just standing there and trying to sort the clothes while he took this off, which didn't take long at all.

Q. Are you today able to identify the individual who came out and removed that hose?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Do you see him in court here today?

A. Yes, sir; I do.

Q. Where is he?

A. He is right over there in back of the gentleman, right here, right there [indicating].

Q. All right. What happened after——

The COURT. Do you want the record to show——

Mr. MCLAUGHLIN. May the record show that she pointed to the defendant Andrew Mallory?

By Mr. MCLAUGHLIN:

Q. After the hose was removed from the faucet, then where did the defendant go?

A. He went back into the janitor's apartment, in through the door.

Q. What did you do after he went back in that door?

A. Well, I filled the tub with water, and I put my first washing in the tub, and then I went back into the
50 locker room, which is screened off for us to hang our clothes, and I started to take the person had washed before me, her clothes down.

Q. When you started to do that, then what happened?

A. I was clear in the back of the locker room which would be to the front of the apartment house, taking the clothes down, when I happened to glance around, and there was this colored fellow standing about, well, I would say, from about where that water glass is there on the table, with the handkerchief over his face.

Q. All right. What did that individual say, if anything?

A. He hadn't said anything and I screamed. He told me in a very quiet voice to be quiet, two times.

Q. And then what happened?

A. Then he run over to me and he choked me. The next thing I knew I was picking myself off the floor, and then he got ahold of me and started to drag me toward the furnace room. My whole left side was bruised.

Q. Did he take you into the furnace room?

A. Yes; he did.

Q. What happened when you got in the furnace room?

A. Well, he put me down on the floor, and I can remember him pulling my shorts and my underclothes off.

Q. At that time, can you tell us whether or not he
51 had sexual relations with you?

A. Pardon?

Q. Can you tell us whether or not he had sexual relations with you?

A. Yes; he did.

Q. In other words, he penetrated you? You felt his privates in your private parts?

A. Yes, sir; I did.

Q. How long would you say you remained in that position?

A. Well, that I don't know. I mean, that I can't say.

Q. Now, is there any reason why you can't say that?

A. Well, no; it just seemed that I must have blacked out, because I don't know. I can't say how long it would have been.

* * * * *

60 Cross-examination by Mr. BRYANT:

* * * * *

61 Q. Now, there came a time when somebody approached you in a menacing sort of way?

A. Yes.

Q. How did you say his face was dressed?

A. He had a white handkerchief, and it was folded this way [indicating], and he had it—all that showed, all I could see was his eyes, and they were very bright.

Q. You said something about a hat.

A. He had a hat on, yes. And that's all I can remember the way he was dressed.

Q. During the course of the time that you had your experience down there, after he grabbed you, did he ever lose that hat, that you know of?

A. That I don't know.

Q. That you don't remember?

A. No, I don't remember.

Q. The only thing you remember was a pair of bright eyes.

A. Bright eyes and a handkerchief, and a high hat.

Q. Now, Mrs. O'Keane, you are not able to say that or
62 you wouldn't say, or would you, that the man who fixed your tub for you and the man who came out there with a handkerchief on his face was the same person?

A. At that time, no. I wouldn't have known it.

Mr. BRYANT. That's all I have, Your Honor.

Redirect examination by Mr. MCLAUGHLIN:

Q. Would you say that he fit the same general description?

A. Yes, sir.

Mr. MCLAUGHLIN. That's all I have of this witness, Your Honor.

Mr. BRYANT. If Your Honor please, I am afraid I will have to ask another question now.

The COURT. Yes, indeed; you may do so.

Re-cross-examination by Mr. BRYANT:

Q. Mrs. O'Keane, when you say the same general description, can you be a little more specific? Was it in the matter of clothing or general build, or what was it?

A. He was tall. The height.

Q. He was tall?

A. Yes.

Q. Was the——.

A. For the way he was dressed, I wouldn't know either
63 time because I didn't pay that much attention.

Q. What impressed you was the fact that he was tall?

A. Tall, yes.

Mr. BRYANT. That's all I have, Your Honor.

* * * * * *

103 SYLVAN YUTER was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Now, Officer, your full name is what?

A. Sylvan Yuter, sir.

104 Q. You are a member of the Metropolitan Police Department?

A. I am, sir.

* * * * * *

110 Q. Can you recall when and where you arrested him on April 8th, 1954?

A. To the best of my recollection, sir, it was after 2, possibly 2:30 in the afternoon of the 8th, the following day, at 1258 Owens Place.

The COURT. What place?

The WITNESS. Northeast.

By Mr. MCLAUGHLIN:

Q. And that's in what section of the city?

A. Northeast.

The COURT. 1258——

111 The WITNESS. Owens Place.

By Mr. MCLAUGHLIN:

Q. After you arrested the defendant at that address, where did you bring him? Where did you take him?

A. I then took the defendant Andrew Mallory to police headquarters, sir.

Q. What time would you say you arrived at police headquarters with the defendant Andrew Mallory?

A. Oh, roughly about three o'clock, sir.

Q. Where did you bring him at police headquarters at about three o'clock on April the 8th? Do you recall what part of the building, I mean?

A. I believe we went to the identification bureau room because our office was busy at the time, as best I can recall.

Q. And the identification room is located on what floor in police headquarters?

A. It is on the third floor, sir.

Q. When you say "we" who was with you when you brought him there?

A. Private Jones of No. 2 Precinct, sir.

Q. When you brought the defendant to the identification room about three o'clock did you talk to him?

A. Just briefly, sir.

Q. All right. When you say "just briefly," did you
112 talk to him about the alleged rape on April 7th?

A. I only had a short conversation with him at the time, and I asked him—I told him what he was arrested for, and asked him about the offense. At that time he denied it to me, sir.

Q. All right. What did he say, as near as you can recall?

A. Well, he did say—I asked him if he had ever seen a woman at that address on the night of April 7th. He said that he saw a lady who asked him to fix the washing machine hose for her. She asked him to hook up the hose. He said he did. He said she was a very nice lady. She said, Thank you very much. I asked him if he recalled what the lady looked like or what she was wearing. I say I asked him. I don't remember whether I or one of the officers there with me asked him, but he did say, Yes, the lady had on a pair of blue shorts.

Q. All right. Did you question him further at that time?

A. Now, that was all he said at that time. But he denied that he had ever done anything at all as far as the charge was concerned.

Q. Now, at the time of this questioning of the defendant, who was present? Can you recall?

A. I am pretty sure that Detectives Mackie and Tate
113 were—wait a minute—I believe Detective Elliott was there for one. I am positive he was there. And I believe either Mackie or Tate were there.

Q. How long did you stay in his company at that time?

A. Not very long then, sir. I was called out to the office. There was a person in there to see me.

Q. You went out to the office?

A. Yes, sir.

Q. Did you have an occasion to see the defendant again that night any more?

A. I did, sir.

Q. All right. And when and where was it that you saw the defendant the second time on the night of April 8th?

A. Well, actually I wasn't at the confronting, but that was at the confronting in the Sex Squad office. But I didn't hear what went on back there at that time, sir. I couldn't say.

Q. When was the next time that you saw the defendant?

A. That was later on the same evening, on April 8th.

Q. Approximately what time was that?

A. That was about 10:30, 10:45, when they held the confronting in the Sex Squad office.

Q. When did you see the defendant at that time? I mean, where was it?

A. He was sitting down talking to the complainant.

114 Q. When you say "the complainant," you mean whom?

A. I mean Mrs. Stella O'Keane.

Q. Was there anyone else present there that you can recall?

A. Well, as well as I can recall, Detective Mackie and Detective Tate were there, and I believe policewoman Goettel.

Q. Anyone else?

A. If there was I don't recall them, sir.

Q. Was Dr. Rosenberg there?

A. I am sorry. Dr. Rosenberg was there.

Q. What did you hear the defendant say, if anything, at that time?

A. I didn't hear what went on there at that time. I was there when Dr. Rosenberg examined the defendant, sir. I am sorry—I had forgotten that part of it. I was there just prior to the confronting when Dr. Rosenberg examined the defendant.

Q. What time would that be?

A. About a half hour before the confrontation.

Q. When you say "the confronting," what do you mean by the confronting?

A. That's when we take the defendant, the complainant, and the pertinent officer in the case and sit down. At that time the complainant is permitted to tell her story to the

115 defendant.

Q. All right. Did you hear the complainant tell her story to the defendant on the night of April 8, 1954?

A. No, sir; I wasn't in a position to hear the whole thing, sir.

Q. You didn't hear it at that time?

A. No, sir.

Q. Now, at any time that night of April 8th did you hear the defendant make any admissions?

A. No, sir; I wasn't in a position to, sir.

Mr. McLAUGHLIN. I believe that's all I have.

Cross-examination by Mr. BRYANT:

Q. Mr. Yuter, you were one of the officers who interrogated this man around about three o'clock, is that right?

A. Just briefly. It was for just a very short time that I talked to him.

Q. Were there any other officers with you at that time?

A. There was in the room. I am trying to recall who they were.

Q. I believe you said——

A. I am pretty certain Sergeant Elliott was there, Mr. Bryant, for one, and I can't recall whether Tate or Mackie were present at that time or not.

Q. Would you say that at least one of them was present?

116 A. I am sure Sergeant Elliott was there, sir.

Q. Were you the only person who was asking the questions?

A. No; I asked him a few questions, and I am sure Sergeant Elliott asked him some questions.

Q. Were you working that day? Were you working daytime?

A. Daytime and nighttime, sir. I worked about 22 hours that particular day, I think.

Q. Let me ask you this: During the time that you were interrogating the defendant, were you on your regular tour of duty, or was it an extra assignment for you?

A. I was working day work, but I don't recall whether it was a split shift or not. You see, two or three times we go in at eight, get off at two, and come back at seven.

Q. During the time you were asking him some questions and he admitted seeing a lady in blue shorts, but he denied molesting her?

A. That's right.

Mr. BRYANT. Your Honor, I have no further questions of this witness.

* * * * *

117 WILLIAM A. ELLIOTT was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Officer, your full name is what?

A. William A. Elliott.

Q. And you are a member of the Metropolitan Police Department?

* * * * *

118 Q. When was the first time, Officer, that you saw the
119 defendant Andrew Mallory?

A. It must—around 3:45 or something like that on April 8th.

Q. Where was the defendant at that time?

A. He was in the identification bureau, to the best of my knowledge.

Q. The identification bureau is located where?

A. In the third floor of police headquarters.

Q. Were there any other people there in the room with him?

A. The officers around who fingerprint and photograph those men. Lieutenant Sullivan.

Q. Keep your voice up.

A. The officers, the men who are assigned to the identification bureau for the purpose of photographing and fingerprinting people who are brought in.

Q. How long would you say he remained in the bureau of identification?

A. Approximately fifteen minutes to a half an hour.

Q. While he was in that room, did you talk to him?

A. Briefly.

Q. Who was present while you were talking to him, do you recall?

A. Lieutenant Sullivan was one, to the best of my knowledge. And I believe Sylvan Yuter was there.

120 Q. Did you question him in regard to the alleged rape of Mrs. O'Keane?

A. Briefly I asked him about it; yes, sir.

Q. What questions did you ask him that you can recall?

A. I asked him was he there and had he done it. He denied it at that time.

Q. When you say he denied it, what did he say, as near as you can recall?

A. He just said it wasn't him, the best I can recall.

Q. How long did you remain in his presence at that time in police headquarters?

A. Just about the same time he was right there at the identification bureau.

Q. Did you see him any more that night?

A. Yes, sir; I did, later on in the evening.

Q. What time would say that was?

A. Oh, somewhere between ten and eleven.

Q. Who was present at that time?

A. Practically every man in the Sex Squad was present at that time.

Q. Where did you see the defendant at that time?

A. In the office of the Sex Squad.

Q. Where was that?

A. That is Room 3053 in police headquarters, on the third floor.

121 Q. At the time that you saw the defendant was there anyone talking to him, any people, member of the Metropolitan Police Department talking to him at that time?

A. Yes, there were.

Q. Can you recall who was talking to him?

A. I think Detective Sergeant Mackie and Precinct Detective Tate were talking to him, and Lieutenant Sullivan, also.

Q. Do you recall whether there was anyone present there besides members of the Metropolitan Police?

A. Yes, sir.

Q. Who else was there?

A. There was a woman by the name of Betty French who I believe Mrs. O'Keane works with. Dr. Rosenberg, the Deputy Coroner for the District of Columbia was there.

Q. Is that all that was there at the time, that you can recall?

A. That's all I recall. There were others, but I don't recall exactly who they were.

Q. Can you recall whether or not Luther Mallory and Milton Mallory were there?

A. I do, yes, now. They were there.

Q. When did you first see Milton Mallory and Luther Mallory?

A. On the morning of the 8th.

122 Q. Where did you see them at that time?

A. In the office of the Sex Squad.

Q. That's the Metropolitan Police Department?

A. Yes, sir.

Q. Did there come a time when you saw Milton Mallory and Luther Mallory and the defendant Andrew Mallory together at police headquarters?

A. At that time they were in the Sex Squad office, at ten o'clock, between ten and eleven, when I saw them all together.

Q. When you say that you saw the defendant about 10 or 10:30 in the presence of Miss French and Dr. Rosenberg and others of the Metropolitan Police, did you question them yourself personally?

A. No, sir; I did not.

Q. Do you recall whether or not anyone questioned them, and who, in your presence?

A. To the best of my recollection it was Detective Sergeant Mackie and Detective Tate. And Lieutenant Sullivan every now and then would ask a question.

Q. Did you hear the defendant say anything at that time?

A. Yes. At that time he did repeat to the complaining witness, Mrs. O'Keane——

Q. What did he repeat to her? What did you hear

123 him say?

A. He told her then that he was the man who had come out of the back room in this basement apartment wearing a mask and he grabbed her and he had taken, raped her.

Q. When you say wearing a mask, did he use the word "mask"?

A. A handkerchief over his face. That is what he had, a white handkerchief.

Q. Did he say anything else at that time as to what he did?

A. Not that I recall.

Q. Was a statement, a written statement, taken from the defendant that night?

A. It was, sir.

Q. Were you present at the time?

A. No, sir.

Mr. McLAUGHLIN. That's all I think I have of this witness.

Cross-examination by Mr. BRYANT:

Q. Mr. Elliott, you say that this man made certain statements to Mrs. O'Keane. Was that a part of what you gentlemen call the confrontation?

A. Yes, sir.

Q. And Mrs. O'Keane had already told him what had
124 happened to her, is that a fact?

A. Yes, sir. She had repeated what had happened, to the best of my knowledge.

Q. And that's of course before he told her that he was the one who had done whatever she had said happened to her?

A. Yes, sir.

Q. And that was about what time? About ten or between ten and eleven?

A. Between ten and eleven, to the best of my recollection.

Mr. BRYANT: Your Honor, I have no further questions of this witness.

The COURT: That's all.

(The witness left the stand.)

* * * * *

125 CHARLES A. MACKIE was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Officer, your full name is what?

A. Charles A. Mackie.

* * * * *

126 Q. You are a member of the Metropolitan Police Department?

A. I am.

* * * * *

Q. Now, as a member of the Metropolitan Police Department and assigned to the Sex Squad, did you have an occasion to see a person identified to you as Mrs. Stella O'Keane?

A. What date was that?

Q. On April 7th of 1954.

A. No, sir; I did not see her on that date.

Q. Recalling your attention to April 8th, the following day, did you see her?

A. Yes, sir, I did.

Q. Where did you see her on April 8th of 1954?

A. That was in the Sex Squad office.

Q. And the Sex Squad office is located where?

A. The third floor of the Municipal Center Building, across the street.

Q. Is that 300 Indiana Avenue?

A. That is right; yes, sir.

127 Q. At what time would you say that you saw her in the Sex Squad office?

A. On April the 8th that was about 11:07 p. m.

Q. In the evening?

A. Yes, sir.

Q. Prior to seeing her in police headquarters at that time, did you see the defendant here, Andrew Mallory?

A. I did; yes, sir.

Q. When and where did you see him for the first time?

A. I saw him about 3 p. m. April the 8th. It was in the identification bureau in the rear.

Q. Who was present at that time that you can recall?

A. At that time Lieutenant Sullivan, Detective Sergeants Ashley, Weaver, Elliott, Tate, myself, and Detective Yuter.

Q. At that time did you question the defendant Andrew Mallory?

A. No, sir; I didn't question him myself at that time, but I was present.

Q. Was he questioned in your presence?

A. Yes, sir.

Q. Who was he questioned by that you can recall?

A. Sergeant Weaver asked him some questions, and Lieutenant Sullivan asked him a few questions.

Q. Do you recall what questions were asked the

128 defendant?

A. No, sir; I don't recall just what questions were asked at that time.

Q. At that time did you know where Milton Mallory was, and Luther Mallory?

A. Yes, sir.

Q. Where were they?

A. They were back there at certain times, and other times they were in the Sex Squad office, but they were on the same floor.

Q. All right. Now, did there come a time when you questioned the defendant?

A. Yes, sir.

Q. Andrew Mallory?

A. I did.

Q. When and where did you question the defendant?

A. That was about 9:45 p. m. April the 8th in the general assignment squad.

Q. Had you been with him from the time you saw him about 3:30 until 9?

A. No, sir; I had not.

Q. Where had you been in the meantime?

A. Well, at 4 p. m. I went home to get something to eat. I returned to the Sex Squad about 7 p. m. that night. I saw him in the Sex Squad office at that time.

129 Q. When you say you saw him, you saw who?

A. The defendant Andrew Mallory.

Q. At the time that you saw the defendant at seven o'clock in police headquarters, who else was there?

A. Lieutenant Sullivan was there; Detective Elliott, Detective Yuter and Tate, and myself. Mrs. Smith who was the police lady attached to our Sex Squad, also.

Q. Where was Milton Mallory and Luther Mallory?

A. They were around in the general assignment squad room with Sergeant McCarty, at different times, separate.

Q. Now, prior to Milton Mallory and Luther Mallory being around with Sergeant McCarty, did there come a time when you saw the three, that is, Milton Mallory, Luther Mallory, and the defendant, in the room together?

A. Yes, sir; I did.

Q. What happened at that time?

A. At that time the defendant was examined by Dr. Rosenberg.

Q. Was there anything else said or done by the defendant and the other Mallorys at that time?

A. Not that I recall.

Q. You say about seven o'clock. Did there come a time when Andrew Mallory went around to Detective McCarty's office?

A. Yes, sir.

130 Q. Was that before or after Luther Mallory and Milton Mallory had been around to see Detective McCarty?

A. That was after.

Q. Afterward?

A. Yes, sir.

Q. Now, prior to them going around there, was there anything said as to why they were going around there?

A. Yes, sir. They had agreed to take a lie detector test.

Q. Who had agreed?

A. Milton Mallory, Luther Mallory, and the defendant Andrew Mallory.

The COURT. Will counsel come to the bench?

(At the bench.)

The COURT. Before we proceed I would like to inquire of the Government whether the Government is planning to introduce any evidence based on any lie detector test.

Mr. MCLAUGHLIN. No, Your Honor. What we intend to do, I will tell you at this time, that they agreed to take the lie detector tests. That is the three of them. Then they were sent around to McCarty, and then McCarty when Andrew Mallory went around there, he called Tate and Mackie and said the defendant wants to talk to you. Then the defendant is supposed to have made his confession verbally to them.

131 The COURT. Very well. I will admit that. That's a good deal like the evidence in the Lansburgh's case where the defendant submitted to a lie detector test which wasn't showing anything, and he threw off the apparatus and said, Well, I can't fool that machine, and made a statement.

Mr. BRYANT. If Your Honor please, I understand it is a formidable-looking thing, and I guess everybody is afraid of it.

The COURT. All right. I think I should explain to you gentlemen the reason why I called you to the bench. If there was a real lie detector test here, I wouldn't admit the result of the test.

Mr. MCLAUGHLIN. That's true, Your Honor.

(In open court.)

The COURT. You may proceed, Mr. McLaughlin.

By Mr. MCLAUGHLIN:

Q. I believe I was asking you whether or not Luther and Milton Mallory went to the office where Detective McCarty was?

A. Yes, sir, they had been there.

Q. And that was before or after the defendant Andrew Mallory went to where McCarty was?

A. Luther and Milton went first.

Q. And then did the defendant go?

A. Yes, sir; he did.

132 Q. Where was the office of McCarty? In what room was it at that time?

A. He was in the general assignment squad.

Q. And where is the general assignment squad?

A. That is on the third floor of 300 Indiana Avenue, about 150 feet from the Sex Squad office.

Q. After the defendant Andrew Mallory went to the office of Detective McCarty, did you see him after that, Andrew Mallory?

A. Yes, sir, I did.

Q. Where did you see him?

A. I saw him about 9:30 or shortly thereafter.

Q. All right. Where was it?

In the general assignment squad office.

Q. How did you come to go to the general assignment office?

A. I was asked to come there by Sergeant McCarty.

Q. When you went to the general assignment room where Officer McCarty was, did you talk to the defendant?

A. I did; yes, sir.

Q. Was there anyone with you in that room beside Detective McCarty?

A. No, sir. At that time it was just Detective Tate, myself, and the defendant.

Q. That's what I said. Tate is somebody. And was

133 Tate present at that time?

A. He was; yes, sir.

Q. Did you talk to the defendant in the general assignment office at the time?

A. I did; yes, sir.

Q. What was said by you and what was said by the defendant Andrew Mallory, if anything?

A. When we went there the defendant told us that he was the one who had attacked the woman.

Q. All right. What did he say?

A. He stated that the woman came to him, knocked on the door that evening; that he came to the door. She asked something about a hose. She was there washing. He fixed the washing machine, went back into the apartment, laid down, and got to thinking about the woman. He went out through the boiler room door, said he put a handkerchief over his face.

and he indicated as to covering up everything but his eyes and his forehead, and came out. The woman was in the drying room. He grabbed her and threw her down, and there was some screaming.

He ran upstairs to the door leading to the basement and locked it. After he came back downstairs and he said the woman had got on her feet again, and he grabbed her again, and half carried her and half dragged her back into the boiler room where he said he had intercourse with her, after
134 tearing her clothes off.

Q. Did you ask him how long or how much time that consumed?

A. He said about ten minutes.

Q. Now, in that conversation did he say if the lady said anything, if the complaining witness said anything to him during the time?

A. Yes, sir. He said that when he first came up that the woman wanted to know if he wanted some money. He told her, No, that he wanted some of her body.

Q. What time would you say that he made that statement orally to you?

A. That was shortly after 9:30 p. m.

Q. Now, after that statement was made to you and McCarty and Tate, what did you do with the defendant Andrew Mallory?

A. The defendant was brought from the general assignment squad around to the sex squad, and about 10:45 p. m. the defendant was examined by Dr. Richard Rosenberg. And about 11:07 p. m. the defendant was confronted by the complainant. The defendant at that time admitted in front of the complainant, Detective Tate and myself—there was also present a Mrs. French who is a friend of the complainant—and also Dr. Rosenberg was there.

Q. Did he repeat to you at that time the same thing
135 he told you down in the general assignment office?

A. Yes, sir, with the exception that in the general assignment office he stated that when he helped the woman to her feet after the attack that she put on a robe which I believe was a purple robe, and ran up the steps. At the time of the confronting he stated that he believed the robe to be pink. That was about the only difference in the story.

Q. What did you do after you confronted the defendant,

that is the complaining witness, in the presence of Dr. Rosenberg and Mrs. French? Did you do anything else with them after that?

A. Yes, sir. After that he was asked if he wanted to put his statement into writing. He agreed to do so. A written statement was taken from him at that time.

Q. Now, was there anything done before the written statement was taken? I mean, did you have an occasion to leave headquarters with him?

A. Yes, sir. After the statement was taken we asked him about the clothing.

Q. What clothing?

A. The clothing that was worn by him at the time of the attack. He said the clothing was in the apartment where he lived, and he gave us a written statement giving us permission to go to the apartment.

Mr. BRYANT. If YOUR HONOR please, I am objecting
136 to this.

Mr. MCLAUGHLIN. Have you got the written statement there?

The WITNESS. Yes, sir; it is in the other room, the witness room.

The COURT. What is the basis for your objection?

Mr. BRYANT. Your Honor, I believe at this time my objection——

The COURT. Suppose you state your objection at the bench. You may come to the bench.

(At the bench.)

(The previous question and answer were read by the reporter.)

The COURT. What is your objection?

Mr. BRYANT. At this point I raise my objection to any so-called permission to go to the premises and take anything that belonged to him, and also to the admission of any written statements made by this man, on the theory that he was not in such shape as to consent to anything. I think this is a seasonable time. Maybe I am late.

The COURT. No; this is a seasonable time.

Mr. MCLAUGHLIN. You mean mentally?

The COURT. I feel this way, Mr. McLaughlin, that he gave permission is a conclusion.

Mr. McLAUGHLIN. I have the statement. I will offer it. I will qualify it.

The COURT. In other words, I want to know just what was said. I will draw the inference whether there was permission or not.

Mr. McLAUGHLIN. Surely, Your Honor. I intend to do that.

(In open court.)

By Mr. McLAUGHLIN:

Q. Now, you say, Officer, you were questioning the defendant about clothes; is that right?

A. Yes, sir.

Q. When and where were you questioning him about the clothes?

A. That was after the statement was obtained from the defendant.

Q. You mean the written statement or the oral statement?

A. The written statement.

Q. Just tell us what was said to the defendant leading up to the questioning about the clothes.

A. We asked where were the clothing which were worn by him at the time. He stated they were in the apartment. We asked him at that time could we go get them. He said yes.

Q. To go where and get the clothes?

A. To the apartment at 1223 12th Street.

Q. What did he say to that?

138 A. He said yes.

Q. Did you make any promises of any kind to him?

A. No, sir.

Q. Were any threats made at that time?

A. No.

Q. Any coercion of any kind?

A. No, sir.

Q. Would you say that the consent was given to you freely and voluntarily on the part of the defendant?

A. Yes, sir.

Q. Just tell us how did it come that this request, or the consent, rather, was reduced to writing? What did you say to the defendant about that?

A. We asked him would he give us written permission to go there and obtain the clothing.

Q. To go where?

A. To go to 1223 12th Street, Northwest.

Q. And for what purpose?

A. To obtain the clothing which was worn.

Q. All right. What did he say to that?

A. He said that he would.

Q. How was it reduced to writing?

A. It was typed, I believe, by Mrs. Smith, and the defendant signed it.

Q. Have you got it there?

139 A. Yes, sir, I believe so.

Q. Let me see it.

(Statement handed to counsel.)

The COURT. Are you offering this in evidence?

Mr. MCLAUGHLIN. In another question, Your Honor, in view of my friend's objection.

The COURT. Suppose you lay the foundation and offer it in evidence, and I will rule on this matter.

Br. Mr. MCLAUGHLIN:

Q. Now, from the first time that you saw Andrew Mallory up until the time that this permission was given to you, how long would you say that he was in your presence, on and off?

A. Well, I did see him in the day from about three to four p. m., and at night on and off from seven.

Q. During that time did you question him, and did others question him in your presence?

A. Yes, sir.

Q. And during that time when those questions were asked by the others and you, would you say that his answers were coherent?

A. Yes, sir.

Q. Was he rational all the time?

A. He was; yes, sir.

Q. Was there anything at all about his talk, actions or demeanor of any kind that would indicate that he didn't

140 know what he was doing?

A. No, sir, I don't think so.

Q. What would you say, from your observation of this defendant over that period of time, as to the time that he signed this permission to search his apartment, that he was of sound or unsound mind?

A. I would say that he was of sound mind.

The COURT. Are you offering that document?

Mr. McLAUGHLIN. I will at this time, Your Honor, after showing it to Mr. Bryant.

The Court. Very well.

Counsel may come to the bench.

(At the bench.)

Mr. BRYANT. If Your Honor please, I am going to object to its admission on this theory: I think that under the doctrine of the Judd case and the Higgins case——

The COURT. The Judd case is the case I have before me.

Mr. BRYANT. Your Honor, I don't believe that that is looked upon as a voluntary consent.

The COURT. Mr. McLaughlin, what do you say about that?

Mr. McLAUGLLIN. Well, I think the Judd case—of course, as I say, going back to the foundation is merely because of the fact that he is under arrest, that in itself doesn't say
141 that he can't consent either to a written confession or consent.

Now, the way they give the Judd case, it is about a fellow being locked up at two o'clock in the morning. They say that there he didn't give them any definite permission. In other words, the wording wasn't definite enough. He gave them permission to go there, but didn't say to search, as I read the Judd case.

The COURT. Of course, I had the Judd case. Judge Clark dissented. With all due deference to the Court of Appeals, I disagree with the Court of Appeals.

Judge Washington, in his opinion says that the defendant said to the police officers, "I have nothing to hide. You can go there and see for yourself." Yet the Court of Appeals held that this was not a voluntary consent.

Mr. McLAUGHLIN. By the way, in regard to that statement, I think they say in the Higgins case where that statement is made, that a guilty man wouldn't make that statement.

The COURT. Well, of course, a guilty man might do just that. He might say, I have got the stuff hidden so well they will never find it, and if I give them my consent I create an impression that I am innocent.

Mr. BRYANT. It is bravado.

The COURT. Of course, it is just lack of practical
142 contact. I want to be practical about this thing. What did they find on this search?

Mr. McLAUGHLIN. They got those garments there.

The COURT. Of what importance are these in this case?

Mr. MCLAUGHLIN. Also the officer went to the boiler room and got some of the dust or something and turned it over to the FBI and the FBI will say that dust from these and dust from the pants and that dust are similar. But they will go so far as to say this, that dust could come from another place because it is characteristic——

The COURT. Is that of any importance to this case?

Mr. MCLAUGHLIN. And the other important thing is that on the pants some spermatozoa will be found, on the pants and the coat and I think the shorts.

The COURT. That's important. The other part isn't. I will tell you right now, Mr. McLaughlin, if I am called upon to rule on this, I am going to rule that you have made a prima facie case of a voluntary consent. But I also want to call your attention to this situation, and you can think it over overnight. In the light of the Judd Case, do you want to run the risk of putting all that in?

Mr. MCLAUGHLIN. As I say, the only thing that we can go by—we always instruct the police department to try to get it in writing because that is the practice of the FBI,
143 Your Honor.

The COURT. I think that is an excellent idea. But in view of the fact that you have a written confession——

Mr. MCLAUGHLIN. Yes; Your Honor.

The COURT. Wouldn't it be better for you not to present these? However, you must make your own decision.

Mr. MCLAUGHLIN. If Your Honor has some doubt, I will forget about it.

The COURT. I have no doubt about it myself.

Mr. MCLAUGHLIN. I understand, Your Honor.

The COURT. It all depends on what Judges of the Court of Appeals happen to sit on this case.

Mr. TINNEY. Which three.

The COURT. Yes, exactly. If you have got a good case without it, it seems to me that it would be good policy not to press this. However, my own intellectual integrity requires me to decide according to what I think is right, according to the facts. If you press this offer I will rule on it and rule that at this time you have made out a prima facie case that the consent was signed voluntarily. Of course, that is subject to rebuttal at the proper time.

I don't know how important that evidence is in the case.

Mr. McLAUGHLIN. I am just trying to think.

Mr. BRYANT. You want to think about it overnight?

144 The COURT. I think this is a good time——

Mr. McLAUGHLIN. I can finish in the next five minutes with other questions.

The COURT. All right. You can finish up everything else except this and leave this.

Mr. McLAUGHLIN. I can go to 3:30.

The COURT. All right.

(In open court.)

The DEPUTY CLERK. Do you want me to mark that?

Mr. McLAUGHLIN. 5.

The DEPUTY CLERK. Government Exhibit No. 5, for identification.

(Written consent signed by defendant was marked for identification as Government Exhibit No. 5.)

By Mr. McLAUGHLIN:

Q. Now, Officer, I believe you testified that the statement was reduced to writing, is that right, the defendant's statement?

A. Yes, sir; it was.

Q. Just tell us how the statement was reduced to writing. In other words, what I want is the mechanics of how the statement was reduced to writing. Do you understand what I mean?

Mr. BRYANT. If Your Honor please, I suspect that I have to object to this, in line with my recent objection to

145 the other matter. I believe this is completely seasonable at this time.

The COURT. It seems to me that the proper time to note that objection—I think you had better come to the bench, gentlemen.

(At the bench.)

The COURT. Your objection is taken about voluntariness?

Mr. BRYANT. Yes; Your Honor.

The COURT. We will have to have a preliminary hearing.

Mr. McLAUGHLIN. You mean the fellow didn't have the mental capacity?

Mr. BRYANT. That's right.

The COURT. If it is a question of mental capacity.

Mr. McLAUGHLIN. It is not a question of force.

The COURT. I want to make it clear, and to clarify my own thinking. Is your objection based on mental capacity or lack of voluntariness?

Mr. BRYANT. On both bases at this time in light of the circumstances.

The COURT. Do you claim that the statement was not voluntary?

Mr. BRYANT. Yes; Your Honor.

The COURT. Then I think I am required to hold a
146 preliminary hearing, in the absence of the jury.

I think then that we will suspend at this time until tomorrow morning. I suggest tomorrow morning you indicate to the Court at the opening of court whether you want to press the offer, and if you decide to do so, perhaps you want to finish up with that aspect of the matter before we go into this written statement. If you decide not to do so, which might be the part of caution and wisdom, by then we will take this matter up.

* * * * *

155 Direct examination by Mr. McLAUGHLIN:

Q. Will you state your name?

A. Charles A. Mackie.

The COURT. I suggest, Mr. McLaughlin, in the interest of brevity that all that is needed at this stage is the testimony of the circumstances surrounding the procuring of the statement. The details of what was said of course need not be gone into at this time. All I have to do is to determine the voluntariness or involuntariness of the statement.

By Mr. McLAUGHLIN:

Q. Recalling your attention to the evening of April 8, 1954, I believe you testified that you left Police Headquarters approximately what time that afternoon or evening?

A. I left Police Headquarters about 4 p. m.

Q. And you say you returned approximately what time?

A. At 7 p. m.

Q. And at 7 p. m. who did you see at Police Headquarters?

A. I seen the defendant Andrew Mallory and several police officers who were in the sex squad at that time.

Q. Were the other two Mallorys there, Luther Mallory and Milton Mallory?

A. Not at that time; no, sir. I believe that one of
156 them may have been there, but I don't recall whether or not he was.

Q. After you arrived back at headquarters when and where did you see the defendant?

A. He was in the sex squad office when I returned about 7 p. m.

Q. Did you talk to him at that time?

A. No, sir; I didn't.

Q. Did he go any place from the sex squad office?

A. Yes, sir. He went to the general assignment squad.

Q. Who was in the general assignment squad?

A. Sergeant McCarty is the only one I know was there at the time.

The COURT. Don't let your voice go down.

The WITNESS. Sergeant McCarty, he was the only one there at that time that I know of.

By Mr. MCLAUGHLIN:

Q. After you saw the defendant go to the general assignment squad where Sergeant McCarty was, did there come a time when you saw the defendant, Andrew Mallory, after that?

A. Yes, sir; I did.

Q. Just explain in detail under what circumstances you saw the defendant, and what happened.

157 A. Sergeant McCarty came to the sex squad office; asked for Detective Tate and myself; said to go to the general assignment squad, that Andrew Mallory wanted to speak to us. We went to the general assignment squad, Detective Tate and myself, and talked to Andrew Mallory.

Q. Was there anyone in the general assignment squad at the time you went there, as a result of the information received from Officer McCarty?

A. Sergeant McCarty walked around with us but left us, and at the time we talked to him there was just the defendant, Detective Tate, and myself.

Q. Go ahead now, and just repeat what was said by you or what was said by the defendant.

A. The defendant was asked if he had anything to tell us, and he said that he did, and he went on to tell about the actual rape.

Q. And then what was said or done after that?

A. After that he was taken back to the office of the sex

squad where he was examined by Dr. Richard Rosenberg. That was about 10:45 p. m. on April 8th. Following the examination he was confronted by the complainant.

Q. The complaining witness?

A. The complaining witness.

Q. In reference to being confronted by the complaining witness just tell us what did you hear there?

158 A. During the confrontation the defendant told the complaining witness what he had done on the previous evening.

Q. At that time was the complainant the only lady in the sex squad room?

A. No, sir; she was not.

Q. How many other women were there?

A. Well, there were several women in the office. Miss Goettel was there; also Mrs. Smith, who was not actually present during the confrontation. There was Miss French, the friend of the complainant, who actually was there during the confrontation.

Q. Did the defendant do anything or say anything as to the identity of the woman he raped?

A. Yes, sir. He was asked to pick out the woman, and he said that the complainant, and he pointed to her and said that that was the woman.

Q. Prior to that had anybody in that office identified that woman to him?

A. Not to my knowledge; no, sir.

Q. And prior to the defendant's statement to the complaining witness as to what happened on the evening of April 7th, had the complaining witness made any statement to the defendant or in the defendant's presence as to what happened on April 7th?

A. Not to my knowledge; no sir.

159 Q. What happened?

A. Well, he stated that he was in his apartment——

Q. Did he make a statement in the presence of the complaining witness at that time?

A. Yes, sir, he did.

Q. And then after he made the statement to the complaining witness as to what happened, what was done next?

A. After that we asked him if he wanted to reduce the statement to writing. He was advised of his rights.

We told him that the statement would have to be voluntary and we would put it down in his own words; that his statement could be used for or against him in court, and he agreed to give the statement.

Q. Just tell us the mechanics of taking the statement.

A. The statement was taken by Mrs. Smith, who as near as humanly possible——

Q. When you say was taken by her, what I want are the mechanics of it. Did she seat herself by the typewriter and was the defendant brought over by the typewriter, and what happened along those lines.

A. Yes. Mrs. Smith sat at the typewriter. The defendant sat right alongside of her and I was close myself, seated, as was Detective Tate, when the statement was taken.

Q. Just tell us the process of the statement. What did Miss Smith ask him, questions, or did the defendant go
160 on verbally, that is, orally? Tell us what happened.

A. The only question that Mrs. Smith asked, to the best of my knowledge, was asked him how he wanted to start it, and he asked if it would be all right to start "Some time around 5 o'clock?" And Mrs. Smith said that would be all right, and his statement began from there. From then on the defendant gave the statement, and at the end of his statement I believe Detective Tate asked him one or two questions, which the defendant answered.

Q. And how long would you say that it took to reduce the statement to writing?

A. About an hour; possibly a little longer.

Q. And after the statement was reduced to writing then what happened?

A. After that the defendant was asked about the clothing.

Q. Was it signed by the defendant—the statement?

A. The statement was signed by the defendant; yes, sir.

Q. And was it witnessed by anyone?

A. It was. It was witnessed by Mrs. Smith, Detective Tate and myself.

Q. After the statement was reduced to writing and signed by the defendant, then what next happened?

A. After that the defendant was asked about the
161 clothing which was worn at the time of the assault. He said of course it was in the apartment. And we asked him about getting the clothes. He said that he would take us there. And Mrs. Smith prepared a little statement that he

would give us permission to go to the apartment and get the clothing.

The defendant signed the statement giving his permission to go to the apartment and get the clothing, and Detective Tate and myself and the defendant went to the apartment on Twelfth Street, at which time the defendant pointed out certain articles of clothing which he said he wore at the time of the assault, and we held those as evidence.

Q. During any of that time that evening did you or anyone else in your presence make any promise to the defendant to make this statement or to give his consent to search his premises?

A. No, sir.

Q. Was any coercion used by you or anyone in your presence?

A. No, sir.

Q. Or any threats of any kind?

A. No, sir.

Q. During the time that you talked to the defendant on that night of April 8, 1954, did you have any trouble understanding him?

162 A. No, sir; I didn't.

Q. As far as you know did he have any trouble understanding you or others who talked to him?

A. No, sir.

Q. Was there anything about his general appearance that would indicate to you that he was suffering from any mental illness?

A. No, sir.

Q. And from your observation of the defendant over that period of time, and your talking to the defendant, what would you say as to his soundness or unsoundness of mind at the time he made the statement to you, and also the time he gave you permission to go to his house to get the clothing?

A. I would say that he was of sound mind; that he was alert and very cooperative.

Mr. McLAUGHLIN. I believe that is all I have.

Cross-examination by Mr. BRYANT:

Q. Mr. Mackie, after this statement was typed by Mrs. Smith——

The COURT. Suppose we mark it for identification.

Mr. BRYANT. It has already been marked, if Your Honor please.

The COURT. Then for the purpose of the record, suppose you refer to the number.

163 By Mr. BRYANT:

Q. Mr. Mackie, I show you what has been marked Government's Exhibit No. 5 for identification, which is the alleged consent statement. Was that statement read to the defendant before he signed it? Do you remember?

A. I don't recall.

Q. Now, I believe you told Mr. McLaughlin that the defendant sat down and picked Mrs. O'Keane out as the woman that he had molested; is that right?

A. Yes, sir.

Q. And you said that prior to that time no one had pointed Mrs. O'Keane out. Is that a fact?

A. Not to my knowledge.

Q. Now, Mr. Mackie, as a matter of fact, this defendant had been confronted with Mrs. O'Keane at that time, had he not?

A. Yes, sir; they were all together at that time.

Q. Yes, but I am speaking specifically now of what you and the sex squad office call the confrontation. You are familiar with that procedure?

A. Yes, sir.

Q. And there had been a confrontation in that office between the defendant and Mrs. O'Keane, isn't that a fact?

A. Mrs. O'Keane didn't utter a word during that confrontation.

164 Q. Let me ask you this. In a confrontation the plaintiff sits down and tells what happened to her, doesn't she?

A. Normally, yes.

Q. Was there anything abnormal about this particular confrontation?

A. Yes. At this confrontation the complaining witness did not tell exactly what happened. In fact, she was asked not to say anything at that time.

Q. Did there come a time when the complaining witness did tell what happened?

A. No, sir, I don't believe so.

Q. So she never sat down before this man and told him what happened to her on that night?

A. No, sir; I don't believe so.

The COURT. She was asked not to say anything, Mr. Bryant. Did I understand you correctly?

The WITNESS. Yes, Your Honor.

By MR. BRYANT:

Q. Was Mr. O'Keane there at that time when this man picked Mrs. O'Keane out? Was Mr. O'Keane there?

A. No, sir, I don't believe he was in the immediate vicinity?

Q. Was Mr. Tate there?

A. Yes, sir.

165 Q. Was Dr. Rosenberg there?

A. He was; yes, sir.

Q. And of course Mr. Sylvan Yuter was there, was he not?

A. Not close by; I don't think.

Q. When you say "close by," give me some idea of what you mean.

A. I would say that he was in the room, but I don't believe that he took part in the confronting.

Q. Well, this happened some time between 10:20 and 10:45, didn't it?

A. The confronting?

Q. Yes.

A. No, sir. The confronting was after 11 p. m.

Q. Let me ask you, when did you get down there, down to the sex squad?

A. About 7 p. m. that night.

Q. And were you there until the confronting took place?

A. Yes, sir.

Q. And you were present at the confronting?

A. Yes, sir.

Q. And you say Mr. Yuter wasn't there?

A. I say he was in the room but I don't think he actively took part in the confronting.

166 Q. Well, you first saw the defendant around 3 o'clock, did you not?

A. About that time; yes, sir.

Q. And then you and Officer Elliott and several more were in the sex squad office at that time?

A. No, sir. We were in the Identification Bureau in the rear of that place.

Q. Well, you didn't question him there, did you?

A. I did not; no, sir.

Q. Did anybody, to your knowledge?

A. Yes, sir. There were Lieutenant Sullivan and Sergeant Weaver was doing the questioning.

Q. And there came a time when you went home, isn't that a fact?

A. Yes, sir.

Q. At the time that you went home was anybody questioning this defendant?

A. I don't know, Mr. Bryant. I left the Identification Bureau and returned to the sex squad office at which time I was told that I could go home at that time and to return later.

Q. When you did leave the presence of the defendant he was being questioned, is that so?

A. Yes, sir; they were talking to him.

Q. You went home and got some dinner, I believe, and
167 came back?

A. Yes, sir.

Q. And about what time did you come back?

A. About 7 p. m.

Q. And at that time this defendant was being questioned by several officers, isn't that a fact?

A. No, sir. At that time, to the best of my knowledge, he was sitting in the sex squad office.

Q. Well, what was he doing in there?

A. Just sitting. He was waiting to go down to the general assignment squad.

Q. Who was there with him?

A. Well, there were several detectives in the sex squad bureau at that time.

Q. Lieutenant Sullivan?

A. Yes; I believe he was there.

Q. Mr. Elliott?

A. I believe he was there.

Q. And Mr. Yuter and Mr. Tate?

A. Yes, sir.

Q. And these men were there, that is, around 7 o'clock, right?

A. Yes, sir.

Q. And you say they weren't questioning him at that time?

168 A. No, sir; I don't believe anyone was at that time.

Q. When there came the time to go around to Mr. McCarty's office—that is the general assignment office, is that so?

A. Yes, sir.

Q. That's where they have this lie detector machine, is that right?

A. Yes, sir.

Q. Who went first?

A. Detective Tate and myself went together and Sergeant McCarty walked there with us.

Q. No, no; I am sorry I confused you.

I believe both Luther and Milton Mallory went around to Mr. McCarty?

A. Yes, sir.

Q. I mean separately, is that right?

A. Yes, sir.

Q. And then I believe the defendant went around there; right?

A. Yes, sir.

Q. Which one of the Mallorys went around there first?

A. I don't know.

Q. How long approximately, did he stay, whoever it was that went first?

A. I don't recall; somewhere around an hour.

169 Q. Around an hour?

A. Yes.

Q. And then when he came back the other Mallory went around?

A. I believe so.

Q. How long did he stay?

A. Approximately an hour.

Q. During that period of time, sir, did you know where the defendant was?

A. To the best of my knowledge he was in the sex squad office and remained there until such time as he went to the general assignment squad.

Q. During that two-hour period, Mr. Mackie, did you or any of the officers in your presence have any conversation with this defendant?

A. No, sir, not to my knowledge.

Q. You were working on the case, weren't you?

A. Yes, sir.

Q. And you were assigned to the case, weren't you? You and Mr. Tate?

A. Yes, sir.

Q. Your major assignment?
A. Yes, sir, among others.
Q. And you were there?
A. Yes.
170 Q. When you say, to the best of your knowledge, is there any doubt about this testimony?
A. No. I didn't talk to him.
Q. Was Mr. Tate in the office with you?
A. At times; yes, sir.
Q. Well, did the defendant say anything to anybody during that two-hour period?
A. Not to my knowledge; no, sir.
Q. Well, again, did he say anything, or did he not? You were there, weren't you?
A. Yes, sir; I was there, in and out at times.
Q. You never saw him say anything to anybody?
A. No, sir.
Q. Can you tell us as best you can just what he was doing?
A. The times I observed him he was sitting.
Q. He was by himself? When I say "by himself" I mean nobody was sitting alongside of him; is that right?
A. There may have been a time that one of the Mallory boys was sitting alongside of him.

By the COURT:

Q. Was there an officer sitting alongside of him?
A. No, sir.
Q. There was no attempt to guard him?
A. Well, the officers were in and out of the sex squad.
171 There is always someone present, Your Honor.

By Mr. BRYANT:

Q. He wasn't toward the front office, was he?
A. No; in the back.
Q. There is no door back there, of course?
A. No, sir.
Q. Mr. Mackie, there came a time when this man made a statement, you say, to Mrs. Smith, who typed it; right?
A. Yes, sir.
Q. And I believe you said that he was seated right alongside, close by Mrs. Smith?
A. Yes, sir.

Q. And you and Mr. Tate were seated right nearby; is that right?

A. Yes, sir; we were nearby.

Q. Tell us if you can—I assume that the defendant was sitting at least as close to Mrs. Smith, who was operating as a stenographer, is that right?

A. Yes, sir.

Q. He was sitting at least as close to her as I am to the clerk; is that right?

A. Yes; I would say so.

Q. How close to Mallory were you sitting?

A. Three or four feet away.

Q. Almost as close as he was to Mrs. Smith?

172 A. Yes, sir.

By the COURT:

Q. Was the statement taken stenographically or was it taken right on the typewriter?

A. Right on the typewriter, Your Honor.

By Mr. BRYANT:

Q. Then Mr. Tate was sitting close by; is that right?

A. Yes.

Q. Let me ask you this question. Have you any idea how long it was—and I am asking for your best recollection approximately—between the time that Mallory went around to see Mr. McCarty and the time that Mr. McCarty sent for you and Tate?

A. I would say near an hour.

Q. You would say it was nearly an hour?

A. Yes, sir.

Q. You said Mr. McCarty came and got you?

A. Yes, sir.

Q. When you went back to the general assignment office, who was there?

A. The only one I recall seeing was the defendant himself.

Q. And there was nobody left to watch him, or anything?

A. I don't recall anyone else being in the room at

173 that time.

Q. When you say "in the room" describe the room. Is it a big room, the big room of the general assignment office?

A. No, sir. The lie detector room is a fairly small room, I would say possibly 12 by 15.

Q. That is the room off from the main office?

A. Yes, sir.

Q. And it was there that you saw the defendant?

A. Yes, sir.

Q. Describe him as he was as you saw him at that time.

A. He seemed to be alert at that time, and as I said he was very cooperative.

Q. Where was he sitting, or was he sitting when you went into the lie detector room?

A. There was a seat in there; he was seated at the time.

Q. How close was that to the machinery?

A. Well, it would have to be within a few feet because actually there is not too much room in there.

Q. Most of that room is taken up with the machine, isn't it?

A. A good bit of it.

Q. The machine as a matter of fact is a pretty large
174 sort of business.

A. The machine itself isn't too big, but the desk that it sits in is quite a large desk.

Q. And was this man connected up with the machine?

A. No, sir; not at that time.

Q. The connections to the machine were right there in plain view, is that so?

A. I would say so; yes, sir.

Q. And you say he was around there about an hour?

A. Somewhere around that time; yes, sir.

Q. Let me ask you this. Is Mr. McCarty here?

A. I believe he is in court.

Q. Do you know whether this man was put on the machine?

A. No, sir; I don't know that.

The COURT. What do you mean by "put on the machine"?

Mr. BRYANT. Was he put on the machine. In other words, do you know whether or not this man was subjected to the test?

The COURT. Oh, well, that is a little different.

Mr. BRYANT. I am sorry. I didn't mean to import any violence.

The COURT. I know you didn't, but I want to keep the record clear.

Mr. BRYANT. Yes, sir; I am sorry.

175 By Mr. BRYANT:

Q. Do you know whether or not the defendant went through the test on the lie detector?

A. Personally, I don't know.

Q. Have you any information on that score?

A. No, sir. The only information I have of course was when Sergeant McCarty came to the sex squad office and said the defendant wanted to speak to us.

Mr. BRYANT. Will Your Honor indulge me a second?

The COURT. Surely. Take whatever time you need.

Mr. BRYANT. Your Honor, I believe that is all I have of this witness.

The COURT. Is there any redirect examination?

Redirect examination by Mr. MCLAUGHLIN:

Q. During that period of time that you were there at Police Headquarters, did the defendant have something to eat?

A. Yes, sir. He was asked at one time if he wanted anything to eat. He said that all he wanted was a Coca Cola and I believe some chewing gum, which was given to him.

Q. Was there anything else given to him at the time?

A. No, sir. I have no knowledge of anything else other than asking him if he wanted to eat.

Q. Recalling your attention, after the defendant stated to you that he made a verbal statement, you stated he
176 made a verbal statement, was there any attempt at that time to get in touch with the United States Commissioner?

A. Yes, sir. Sergeant Elliott made a call to the home of the United States Commissioner, and the Commissioner was unavailable at that time.

Q. And that was approximately what time on April 8th?

A. It was some time after 10 o'clock.

Mr. MCLAUGHLIN: I believe that is all.

By the COURT:

Q. When you say that the Commissioner was not available do you mean that he wasn't there, or do you mean that he was there but was unable to take the matter up? Which was it?

A. Sergeant Elliott talked to the wife of the Commissioner, and that was what he told me, that the Commissioner was

unavailable at that time. I didn't go into it any further with him.

Q. There are two questions I would like to ask the witness. Would you explain under what circumstances and for what purpose the defendant was taken from the sex squad office to the general assignment office?

A. Your Honor, he was taken from the sex squad office to the general assignment squad for the purpose of the lie detector test.

177 Q. How did the idea of the lie detector test originate?

A. Some time after 4 p. m. the detectives who were working on the case asked the defendant and Luther Mallory and Milton Mallory if they would take the lie detector test, and all three agreed.

Q. One other question I want to ask you.

You testified, I believe, that during part of the time when the defendant was in the sex squad office he was seated by himself and the detectives were in the room. What were the detectives doing at that time, in a general way?

A. Just taking care of certain things they had to do; routine business, Your Honor.

Q. In other words, they weren't there for the purpose of questioning the defendant?

A. Not at that time, Your Honor.

* * * * *

178 DR. RICHARD M. ROSENBERG being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

Q. Doctor, your full name is what?

A. Richard M. Rosenberg.

Q. And you are a deputy coroner for the District of Columbia, is that right?

A. That is right.

Q. Recalling your attention to April 8, 1954, do you recall seeing a party identified to you as Andrew Mallory?

A. I do.

Q. And when did you first see that individual, doctor?

A. At 10:45 p. m., April 8, 1954.

Q. And where was the defendant at the time that you saw him?

A. In the office of the sex squad at Metropolitan Police Headquarters.

179 Q. And who else was present at that time? Can you recall, Doctor?

A. Officer C. A. Mackie and Officer V. E. Tate.

Q. At that time, Doctor, did you have occasion to talk to the defendant?

A. I did.

Q. And can you recall the nature of your conversation with the defendant?

A. I can if I can use my notes which I made at the time.

Q. You made the notes at the time?

A. That is right.

Mr. McLAUGHLIN. Have you any objection?

Mr. BRYANT. No; I have no objection to the doctor referring to his notes.

The COURT. Very well.

A. (Continuing.) The defendant said he had been brought to headquarters about 2:30 that afternoon.

I asked him if he had been treated well. He said Yes, that he had not been struck or threatened; that no promise of any kind had been made to him other than that he would receive a fair break.

He said he felt O. K. and had no complaints except that he had a slight cold.

He said at 5 p. m. that day he had some soup, bread,
180 also a couple of cokes and chewing gum; that he had been given plenty of cigarettes. Also he had been taken to the toilet whenever he wished.

He said he had been treated well by everyone, and got up a little after 11 that day, and was not exhausted.

I asked him if he would remove his clothes in order to be examined, and he said he would, and he did.

There were no marks of injury anywhere, and during the examination the pubic hair, the hair on the lower part of the abdomen, was combed by me in an effort to find if there were present any foreign hairs. The result of that examination was turned over to Officer Tate.

By Mr. McLAUGHLIN:

Q. How long a period of time did you talk to the defendant?

A. Probably about a half hour.

Q. And did you have any trouble understanding him: Doctor?

A. No.

Q. Would you say that he was alert?

A. Yes.

Q. Would you say that he had any trouble understanding your questions?

A. No.

Q. Was there anything about his outward appearance
181 that would indicate to you that he was suffering from any mental illness?

A. No.

Q. Was there anything from the questions you asked him and his answers to you, that he was suffering from any mental illness?

A. No.

Q. Would you say from your talk with the defendant, and your observation of him over that period of time, that he was of sound or unsound mind?

A. So far as I could determine; yes.

Q. He was of what?

A. Of sound mind.

Mr. McLAUGHLIN. I believe that is all.

* * * * * *

185 Thereupon IRMA P. SMITH being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN.

Q. Your name is Mrs. Irma Smith?

A. Yes, sir.

Q. And you are a member of the Metropolitan Police Department?

* * * * * *

186 Q. If you will, Mrs. Smith, just tell us in your own way, and in detail, just the mechanics of taking that statement; just what was done and what was said and who said it.

A. Mr. Mallory took a seat beside a desk at which I was seated. He was advised by Mr. Mackie and Mr. Tate that he could give a statement voluntarily if he wished to do so; and in my presence he said that he wanted to.

So I explained to him that if he would talk slowly and clearly and loud enough that I would write down whatever he told me to on the typewriter.

He asked, Well, where do you think we should begin? And I told him that I thought that he should begin as nearly to the main incident, or happening, that would make it clear to someone else.

So he began talking, and as he talked along I wrote it as nearly as I could. If he went too fast I would ask him to please slow up, and if there was any doubt about hearing I would repeat it and if it weren't correct he would tell me "I say so and so" and we would write it down just as he was talking.

Q. You mean you were actually taking it on the typewriter?

A. As he spoke.

Q. And did he then voluntarily make a statement?

A. Yes, sir.

187 Q. And you took it down on the typewriter?

A. Yes, sir.

Q. And after the statement was taken and reduced to writing was it read to the defendant or shown to him?

A. I asked him could he read. He said that he could. And so he was given the statement to read, and I asked him to read all of it, everything that was written thereon.

Q. Was the statement signed by the defendant in your presence?

A. Yes, sir.

Q. And was it also signed by you?

A. Yes, sir.

Q. How long a period of time would you say that it took to reduce that statement to writing, if you can recall?

A. I believe we began the statement about 11:30 p. m. on April 8th, and the statement was completed about 12:25 a. m., April 9th.

Q. In other words, the time is on the statement itself, is that right, Mrs. Smith?

A. Yes, sir.

Q. During the time that you talked to the defendant, and the defendant talked to you, did you have any trouble understanding him?

A. He spoke very well.

Q. And did he have any trouble understanding you,

188 as far as you knew?

A. As far as I knew he had no trouble because he had no questions.

Q. No questions?

A. No questions.

Q. And was he alert during that time?

A. Quite alert.

Q. Was there anything about his general demeanor or appearance or the way he talked that would indicate that he was suffering from any mental illness?

A. Not in my opinion, sir.

Mr. McLaughlin. I believe that is all.

* * * * *

192 Q. When you went home they were talking to him?

A. At 6 o'clock? To the best of my recollection they were.

* * * * *

Q. At that time that this man sat down next to you and gave you this statement, Officer Mackie and Officer Tate were there, were they not?

A. Yes, sir.

Q. And were they sitting—were you and the defendant and Mackie and Tate sitting in a group, so to speak?

A. I am here [indicating] and the defendant was sitting right there, and Mr. Mackie and Mr. Tate was sitting behind us.

Q. And one of them behind him and one of them behind you, approximately, is that right?

A. Just the distance of a chair or so, not touching each other, but not too far away.

193 Vernie E. Tate being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLaughlin:

Q. Officer, your full name is what?

A. Vernie E. Tate.

Q. And you are a member of the Metropolitan Police Department?

200 Cross-examination by Mr. Bryant:

Q. Officer Tate, before this man told you he wanted to talk to you around at Mr. McCarty's office, you and

Mr. Mackie and perhaps some other officers had questioned him, isn't that right?

A. Briefly, earlier in the evening; yes.

Q. When you say briefly, what do you mean?

A. Well, as far as I am concerned, I think it was about 20 minutes. That was about 3 o'clock in the afternoon.

Q. Lieutenant Sullivan and Mr. Elliott and Mr. Yuter questioned him too at some time, didn't they?

A. Well, they were all present at the same time at this 3 o'clock talk.

Q. What happened after the 20 minutes that you questioned him? Then where did you go?

A. Sergeant Mackie and I were sent home and told to report back to the office.

Q. He was being questioned when you left, wasn't he?

A. I believe he was getting something to eat at that time.

Q. When you came back he was being questioned?

201 A. He was around in the general assignment office, yes—he could have been.

Q. You came back around 9 or 9:30?

A. I believe it was around 9, between 8 and 9.

Q. Do you know what happened when you were away?

A. No.

Q. During the time you questioned this man, Mr. Tate, you asked him about that basement around there, didn't you, on Twelfth Street?

A. Which time are you referring to?

Q. Any time before he made his statement to you. How many times did you question him?

A. Just at 3 o'clock and again about 9:30. Neither time did I mention anything about a basement; no, sir.

Q. What did you ask him at around 3 o'clock?

A. At 3 o'clock I think all the questions I heard directed to Mr. Mallory was by Sergeant or Lieutenant Sullivan, and it all had to do with his activities on the previous day and evening, and just what he had done, and there weren't too many questions asked.

Q. Were there any questions asked of this man which might let him or anybody else know that he was being questioned in connection with a rape charge?

A. Well, he inferred to us that he knew about it, sir.

202 Q. How did he do that?

A. Because his brother Luther had told him. That he told us at 3 o'clock.

Q. What did he say?

A. His brother, Luther Mallory, had told him that when he returned some woman had been attacked and beaten in the basement, and he was told by Luther to get out of this apartment and leave until things quieted down a little bit.

* * * * * *

SERGEANT JAMES K. MCCARTY being first duly sworn was examined and testified as follows:

214 Direct examination by Mr. MCLAUGHLIN:

Q. Sergeant, your full name is what?

A. James K. McCarty.

Q. And you are a member of the Metropolitan Police Department?

A. Yes, sir.

* * * * * *

Q. Calling your attention to April 8, 1954, did there come a time when you saw a person identified to you as Andrew Mallory?

A. Yes, sir.

Q. And just where were you at the time?

A. In the general assignment squad room in the Detective Bureau, sir.

Q. And approximately what time would you say this person identified to you as Andrew Mallory was brought in, the approximate time, officer?

A. I first saw him about 6 p. m., sir.

Q. And where was he at that time?

A. Seated alongside the west wall of the room.

215 Q. Of what room?

A. Of the general assignment squad room.

Q. Was there anyone else with him at that time?

A. Yes, sir.

Q. Who else was with him at that time?

A. There were three other men with him at that time.

Q. Can you recall who those other men were?

A. I recall that two of them had the same last name, and the other was possibly the same last name, but a relative, is my recollection, sir. It is a long time ago.

Q. Did there come a time when you tested the defendant Andrew Mallory?

A. Yes, sir.

Q. With the lie detector test?

A. Yes, sir.

Q. Was he the first one or did you test others prior to him?

A. I examined two prior to the defendant.

Q. And how long would you say that you spent with the defendant in the room, that is, Andrew Mallory?

A. I believe about an hour and a half, beginning shortly after 8 o'clock.

Q. That is with the defendant Andrew Mallory?

A. Yes, sir.

Q. And as a result of talking to him there in the room,
216–217 what did you do?

A. I asked him if he would be willing to tell Detective Tate and Detective Mackie what he had told me about the case.

Q. And what did he say to that?

A. He said, Yes, he would.

Q. And then what did you do?

A. I asked those two officers to come into the room.

Q. And did they come into the room?

A. Yes, sir.

Q. And did he talk to them in your presence?

A. For a few minutes I remained in the room asking him to tell these officers what he had told me. I only remained a few minutes. I left the room and took no further part in the investigation.

Q. And during the time that the defendant Andrew Mallory was in your presence did you make any promises to him that if he made a statement that consideration would be shown him?

A. I did not.

Q. Did you threaten him at any time?

A. No, sir.

Q. Was any coercion used upon him by you to make the statement?

A. No, sir.

218 Q. Was the statement made to you freely and voluntarily?

A. Yes, sir; it was free and an expression of sorrow.

Q. What do you mean by that?

A. He stated several times how sorry he was that this happened.

Mr. McLAUGHLIN. I think that is all I have to ask him.

Cross-examination by Mr. BRYANT:

Q. I gather that when you asked the defendant whether he would make a statement to Mr. Tate and Mr. Mackie and tell them what he had told you, that he had made certain admissions to you; is that a fact?

A. That is right, sir.

Q. Sergeant McCarty, would you tell us as briefly as you can, but at the same time as completely as you can, just what went on between you and Mallory, the defendant here, after he was brought to your room for the purpose of the testing? Can you tell us how that went?

A. Yes, sir.

Q. Please.

A. I first talked with the defendant shortly after 8 p. m. He expressed a desire to take a lie detector test to show these officers that he had nothing to do with the case. He signed a statement to that effect.

219 I discussed the case with the defendant for 15 or 20 minutes. I then conducted the examination which consumed a total period of time while asking questions on the machine of about 20 minutes, consisting of three short series of questions.

After completing this test he continued for some period of time to deny any knowledge of the case except what had been told, and denying any part in it himself.

After some few minutes further he stated that he might have done it. Then finally, expressing how sorry he was for what he had done, he told me that on the previous evening a white lady had knocked on the door of the room in which——

Mr. McLAUGHLIN. Your Honor, I don't want to cut him off, but I believe that is the part Your Honor isn't interested in.

The COURT. If I admit the evidence we will have him back and we will have the details of the statement. What we are interested in now are the circumstances.

By Mr. BRYANT:

Q. Now, Sergeant McCarty, after he ran through these series of questions you continued to interrogate him, is that right?

A. I continued discussing the case with him; yes, sir.

Q. How long did it take you to put him in position to
220 be tested with this machine, I mean, hook it up?

A. Actually, you speak of hooking it up, it is a matter of a very few moments.

Q. Very few minutes?

A. Moments.

Q. Did he show any apprehension about that type of arrangement?

A. He appeared anxious to take the examination.

Q. Anxious to take it?

A. Yes, sir—a nervous tension about him to a degree.

Q. There was some nervous tension about him?

A. Expressing that he wanted to take it just for showing these officers he had nothing to do with the case.

Q. During the time he actually took it, did anything unusual appear about him to you during the time he actually took the examination?

Excuse me; I don't want to confuse you. I don't have in mind the reading on your machine; I mean your general observation of him; how did he appear during the actual taking of the test?

A. You mean physically, his physical or psychological reaction?

Q. Physically, did you see any sign of high nervous tension at all?

A. Not to any marked degree; no, sir.

221 Q. As you took him off the testing apparatus, when you discontinued your testing apparatus and continued to interrogate him, did you have any impression that there was any high nervous tension with him?

A. He apeared worried and expressed shortly thereafter sorrow for what he had done.

Q. Was that before or after he said "I might have done that." Was that before or after that?

A. There was nothing very unusual in the manner or behavior as would vary from many other people that I deal with.

It may be that I don't understand exactly what you are asking me to refer to.

Q. I wanted to ask you whether or not this man gave you——

Your Honor, Mr. McLaughlin might have asked this question, I don't recall.

The COURT. That is perfectly all right.

By Mr. BRYANT:

Q. Did this man give you any impression that he was not a normal individual under the same circumstances, considering his circumstances? Did he give you the impression that he was abnormal in any respect?

A. Not so far as I know. I wouldn't consider myself qualified to——

222 Q. I don't mean from a psychiatric point of view.

The COURT. As a layman, in other words.

Mr. BRYANT. Yes, Your Honor. Thank you.

A. It appeared to be within reasonable bounds of normal behavior.

Mr. BRYANT. That is all. Thank you.

Mr. MCLAUGHLIN. That is all.

The COURT. You may step down.

(The witness left the stand.)

* * * * *

238 VERNIE E. TATE, the witness on the stand at the time of taking the recess, resumed the stand, and testified further as follows:

Cross-examination by Mr. BRYANT:

239 Q. Now, Mr. Tate, please tell me, I believe you started examining this man around 3 or a few minutes before 3 in the identification room?

A. Yes.

Q. And you spent about maybe 20 minutes with him?

A. Yes, sir.

Q. And then you went home?

A. Yes; I left the building.

Q. And then you didn't interrogate him any more until after Mr. McCarty sent for you, is that right?

A. That is correct.

Q. And at that time you say he made certain admissions to you?

A. Yes, sir; that is right.

Q. Were you in the defendant's presence at any other time during that afternoon, at which time other officers in the sex squad interrogated him?

A. At the confronting later in the sex squad office.

Q. Let me put it this way: Prior to the so-called admissions made to you, I mean up to about the time you went around to the large place, did anybody interrogate him in your presence?

A. Not in my presence; no, sir.

Mr. BRYANT. I believe that is all I have with Mr. Tate.

* * * * *

240 CHARLES A. MACKIE, a witness called by the United States, having been previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION

* * * * *

253 Q. During the evening there of April 8, 1954, after the defendant had made a verbal statement to you, did there come a time when you got in touch or tried to get in touch with the United States Commissioner?

254 A. Yes, sir. That was done not by me personally.

Q. Can you recall the approximate time that was done?

A. Shortly after 10 p. m.

Q. On the night of April 8, 1954?

A. That is right.

Q. When was the defendant finally arraigned?

A. He was arraigned on April 9, 1954.

By The COURT.

Q. At what time?

A. I don't know the time exactly, Your Honor.

Q. Was it in the morning or in the afternoon?

A. I think it was in the morning, Your Honor.

* * * * *

270 LUTHER R. MALLORY, Jr. was called as a witness by the United States, and being first duly sworn, was examined and testified as follows:

Direct examination by Mr. MCLAUGHLIN:

* * * * *

271 Q. After you were brought to the sex squad office did there come a time when you saw Andrew Mallory?

A. Well, later on that evening I saw him.

Q. What time did you see him?

A. Well, somewhere between 3 and 4 o'clock I think before I saw him.

Q. And when you saw him at 3 or 4 o'clock where was he?

A. I believe he was in the office, the sex squad office.

Q. And were you in the same office?

272 A. I was; yes.

Q. Was there anyone else in that office at that time?

A. My brother Milton was in there and some other officers.

Q. And were you questioned at that time?

A. Not at that time; no, sir.

Q. Was Andrew Mallory questioned at that time, in your presence?

A. No, sir; I don't think he was.

Q. What were you doing, just sitting there?

A. Well, at the time I was.

Q. Did there come a time when there was some discussion about a lie detector test?

A. Yes, there was.

Q. What time was that?

A. I am not sure about the time. It was sometime late that afternoon, but I am not sure.

Q. Can you give us some idea as to the time?

A. I don't know, it must have been after 5 o'clock.

Q. After 5?

A. Yes, sir.

Q. And that is p. m., in the evening, is that right?

A. Yes.

Q. And that discussion of a lie detector test was taking place whereabouts in the building?

273 A. In the office of the sex squad.

Q. And who was in that discussion?

A. Well, there would be some of the detectives was in there.

Q. I meant were you one of those who were discussing about the lie detector test?

A. Yes. He asked me if I would take a lie detector test.

Q. What did you say?

A. I told him I would.

Q. And was Milton asked that question?

A. Yes, sir.

Q. And was the defendant Andrew Mallory asked that question?

A. Yes, sir.

Q. And what did they say?

A. They stated they would, they would take the test.

Q. That was about what time?

A. I don't know the exact time. I think it was some time after 5 o'clock, I am not sure.

Q. After 5?

A. Around or after 5.

Q. After it was agreed by the three to take a lie detector test, was anyone immediately given the lie detector test?

274 A. Not immediately; I don't think.

Q. Was there any reason told you or the others why it wasn't?

A. For one reason we ate afterwards, I mean between that time.

Q. You ate?

A. Yes, sir.

Q. Who ate?

A. Well, I did, for one.

Q. And did Andrew Mallory eat in your presence?

A. I am not sure if he did or not. I have forgot it if he did.

Q. Who bought the food?

A. They brought it from somewhere in the building there.

Q. Did they ask you what you wanted to eat?

A. No, sir; they didn't ask what we wanted.

Q. They brought it?

A. Yes.

Q. After you ate was there any discussion about the lie defector test?

A. Well, the next thing was I think he called my brother Milton in first to take the test.

Q. Was there any discussion at that time as to whether the man was present who could give the lie detector test?

275 A. I think he must have after we had some food, I think he was there then. I don't think he was present when he first asked him.

Mr. BRYANT. I don't think that is quite responsive.

Mr. MCLAUGHLIN. I will ask a direct question.

By Mr. MCLAUGHLIN:

Q. Was there anything said immediately after the three of you agreed to take the lie detector test why it wasn't given to you immediately?

A. Well, like I said, I am not sure, but I don't think the man was there to give it.

Q. Why do you say that?

A. We had to wait for a while.

Q. How long did you have to wait?

A. Like I say, I think it was around 5 o'clock or a little afterward when they mentioned taking the lie detector test and then it was later on.

The COURT. Speak up loudly.

The WITNESS. It was later on.

By Mr. MCLAUGHLIN:

Q. When you say "later on" what period of time?

A. I don't know, sir. I was there but I didn't have any way of keeping time.

Q. Was it an hour, half an hour, or a quarter of an hour?

276 A. It was more than an hour, I think.

Q. During that hour what did you, Andrew Mallory, and Milton Mallory do in the sex squad office?

A. Just sat there.

Q. Just sat there waiting?

A. Yes, sir.

Q. After that hour had passed did there come a time when someone of the three of you left the sex squad room?

A. Yes, sir.

Q. And which one left?

A. You said during that hour or afterward?

Q. After the hour.

A. Oh, my brother Milton left first.

Q. And when he left how long did he stay away from the room?

A. Well, I would say between 45 minutes and an hour.

Q. And during the 45 minutes or the hour that Milton was out of the room were you and Andrew still in the sex squad room?

A. Yes; we were.

Q. Was there anyone questioning you or Andrew at that time?

A. No, sir.

Q. You just sat there waiting, is that right?

A. Yes, sir.

277–300 Q. When Milton returned to the room, to the sex squad room, did anyone else leave the sex squad room?

A. Yes, sir, I did myself.

Q. And when you left the sex squad room where was Andrew Mallory?

A. He was still in the office there.

Q. How long did you remain out of the sex squad room?

A. About the same time, 45 minutes or an hour, I think.

Q. And then did you return to the sex squad room?

A. Yes; I did.

Q. And when you left the sex squad room where did you go?

A. To the room where they gave you the lie detector test.

Q. And when you returned to the sex squad room did you see Andrew Mallory?

A. Yes; he was there.

277–300 Q. All right. Then what happened to him?

A. Well, he went after I came back.

Q. He went after you?

A. Yes.

Q. Were you there when Andrew Mallory returned to the sex squad room?

A. Yes. I was there.

* * * * *

317 JAMES K. McCARTY was called as a witness by the United States and, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. McLAUGHLIN:

Q. Officer, your full name is what?

A. James K. McCarty.

Q. And you are a member of the Metropolitan Police Department?

A. Yes, sir.

* * * * *

318 Q. Recalling your attention to April 8th of 1954, did you see a person identified to you as Andrew Mallory on that date?

A. Yes, sir.

Q. Can you recall the approximate time that you saw him?

A. For the first time about 6 p. m.

Q. Where was he at that time?

A. Seated in the general assignment squad office.

Q. Did you talk to him at that time?

A. No, sir.

Q. Who was with him at that time, can you recall?

A. Milton Mallory, a brother of Milton's, and Andrew Mallory, and a fourth person that I don't at this time recall, but there were four seated together.

Q. Did there come a time when you did talk to the defendant Andrew Mallory?

A. Yes, sir.

319 Q. At what time would you say that was?

A. Shortly after 8 p. m.

Q. Prior to talking to Andrew Mallory, had you talked to Luther Mallory and Milton Mallory?

A. Yes, sir.

Q. When you talked to Andrew Mallory, did you talk to him in regard to an alleged charge of rape?

A. I did, sir.

Q. On 12th Street, Northwest, in the District of Columbia?

A. Yes, sir.

Q. What did he tell you, if anything, about that?

A. He stated that he was not responsible, that he knew nothing about it other than what he had been told by the officers investigating the case; and that he would like to take a lie detector examination to show those officers that he had nothing to do with it.

Q. All right. You talked to him further after that conversation?

A. Yes, sir.

Q. What was the next conversation you had with him?

A. We discussed the case. I obtained from him information as to his age, place of birth, extent of education, and what pertinent information I could about him personally.

Q. Was he cooperative at that time?

320 A. Yes, sir.

Q. Did you have any trouble understanding him?

A. No, sir.

Q. His talk?

A. No, sir.

Q. Was he alert?

A. Yes, sir.

Q. And after receiving that information did you question the defendant further?

A. Yes, sir.

Q. All right. What questions did you ask him, and what was his response, as near as you can recall?

A. He continued denying any guilty knowledge of the case in question.

Q. What conversation did you have with him, and what did he say, and what—yes, I will stop there.

A. Possibly I don't understand your question, sir. Are you referring——

Q. I say, did you have a further conversation with him?

A. Yes, sir.

Q. All right.

A. I was with him for a total time of about one and a half hours, the two of us alone. During that period of time I did conduct a polygraph examination.

Q. We can't go into the examination itself. What you meant, you talked to him over that period of time, is that right?

321

A. Yes, sir.

Q. Did there come a time when you talked, after talking to the defendant Andrew Mallory, that you had an occasion to call or talk to Officer Mackie?

A. Yes, sir.

Q. Just what conversation did you have with the defendant prior to the time that you talked to Officer Mackie?

A. Shortly before the expiration of this one and a half hours, Andrew first stated that he could have done this crime, or that he might have done it. He finally stated that he was responsible, and went into some detail as to what actually did occur.

Q. Do you recall the details that he went into?

A. Yes, sir.

Q. All right. Tell us what he told you.

A. He stated that on the previous evening at about 6 p. m. he was in the janitor's quarters of this building, and a lady dressed in shorts knocked on the door and requested him to help her with a washing machine that was not working properly; that he did help her, fixing a hose, I believe, a water hose.

He then returned to the janitor's quarters. My recollection is that he stated he laid down on the bed for a

322

period of time, thinking about this lady that he had helped with the washing machine; that his description was that he wanted that lady; that he then came out of the

janitor's quarters and grabbed the lady around the waist, and removed her to another part of that basement. I believe he said a furnace room or coal room, furnace room, I believe, is what he stated.

And either before moving her back to the furnace room or immediately afterward, he stated that he locked a door. I believe it was at the top of a set of steps. He returned to her and had sexual intercourse with her; that there was very little conversation; that after this act was completed, the lady put on a robe and walked upstairs; and that he went back into the janitor's quarters after getting his hat which he had dropped at some place in the basement; that he changed some of his clothing, and shortly thereafter left the building.

Q. Was it after that conversation to you that you called Officers Mackie and Tate?

A. Yes, sir.

Mr. McLAUGHLIN. I believe that's all I have of this witness.

The COURT. Will counsel come to the bench?

(At the bench.)

The COURT. Mr. McLaughlin, I observe from my
323 notes that when you called this witness in the preliminary hearing outside of the presence of the jury, you concluded his testimony by eliciting testimony to the effect that this statement was a voluntary statement. I don't know whether you want to elicit it at this point.

Mr. McLAUGHLIN. I will ask him.

The COURT. It is for you to decide.

Mr. McLAUGHLIN. I will ask him.

(In open court.)

By Mr. McLAUGHLIN:

Q. Now, at any time, Officer McCarty, while Andrew Mallory was in the general assignment office, and in your presence, did you at any time make any promises to him that if he made the statement any consideration would be shown him?

A. No, sir.

Q. Did you make any threats as to him making the statement?

A. No, sir.

Q. Any coercion used by you?

A. No, sir.

Q. Would you say the statement was made to you freely and voluntarily?

A. Yes, sir.

Mr. McLAUGHLIN. That's all.

The COURT. You may proceed, Mr. Bryant.

324 Cross-examination by Mr. BRYANT:

Q. Mr. McCarty, around six o'clock in the evening of April 8th, where were these people when you first saw them? When I say "these people" I mean Andrew Mallory and his two relatives.

A. Seated in chairs alongside the west wall of the general assignment squad office.

Q. Do you know how they came to get there or be there?

A. No, sir. They were with some other officers, some members of my squad at that time, when I entered the room.

Q. I believe you said that at that time you had no conversation with any one of the three of them.

A. Other than possibly I spoke to them.

Q. No official conversation?

A. No, sir.

Q. When was it or about how much time had elapsed before you tested the first one of these people?

A. Very few minutes, time necessary to go back to the adjoining room just south in the building of the general assignment squad office and prepare my equipment and so forth for conducting examinations.

Q. You say these people were in the main office of the general assignment office at that time?

A. Yes, sir.

325 Q. Now, you went into the room where the lie detector machinery is and prepared it for use, is that right?

A. Yes, sir.

Q. Then you called or somebody sent you one of the persons out there, is that right?

A. Yes, sir.

Q. And it wasn't this man over here at that time? It wasn't the defendant?

A. No, sir.

Q. All right. When you got through with the first man on the test, did you open the door and come out with him?

A. Yes, sir.

Q. Who was in your office at that time? When I say "your office," I mean the general assignment room. Were there other people still waiting out there?

A. I don't know that they had any particular reason in waiting for me, but there was business being transacted in the office, and several officers there.

Q. Perhaps you misunderstood me, Mr. McCarty. You first saw Milton Mallory, and another man, Luther Mallory, and the defendant?

A. Yes, sir.

Q. And there was somebody else whose name you don't recall?

A. Yes, sir.

326 Q. Those people were in the main office of the general assignment office?

A. Yes, sir.

Q. When you prepared your machinery for use, you either called or somebody sent one of these persons in to see you. When you got through and were ready for the next person, was the next person out there in the assignment office along with the defendant?

A. That is my recollection; yes, sir.

Q. Now, Mr. McCarty, in the room where you have the lie detector machinery, it is not a very big room, is it?

A. No, sir, it isn't.

Q. It is designed to accommodate that machinery, isn't that so, mainly, and give you working room?

A. Primarily so. It was divided from the existing room there for the purpose of conducting examinations.

Q. When you conduct an examination, Mr. McCarty, for instance, you are going to have me as a subject, if I go in that room of course the doors are closed, are they not?

A. There is only one door to this office.

Q. That door is closed, isn't it?

A. And a large window to the outside, east side of the building.

Q. Now, that door connects with the main office?

A. With a hallway leading to the main office. There

327 is a narrow corridor down the building.

Q. Whatever it connects with, once you take a man in for purposes of testing, you close that door, don't you?

A. That is correct, sir.

Q. That's in order to acquire what you call ideal conditions, isn't that a fact?

A. Yes, sir, to eliminate any outside noises or disturbances of any kind.

Q. Can you tell us, can you give us some rough idea of the size of that machine? When I ask you that I mean this: Is it as long as this table is wide?

A. The instrument is 11½ by 12¾ by about 18 or 19 inches in length, and weighs 61 pounds. It is imbedded in a desk.

Q. And you say it is imbedded in a desk?

A. Yes, sir.

Q. Does it have any dials or rheostats or controls on it?

A. Yes, it has controls on it.

Q. Could you tell me most nearly what it looks like? Does it look like a dashboard on a car or control panel on an airplane? What does it look like, just roughly?

A. It would be similar in appearance. It is a flat panel about this length [indicating] with the dial that you speak of
328 up in this corner. A series of controls for each of the three components of the instrument. And to the extreme left three recording pins which record on a continuing moving graph.

Q. When one is ready for the testing, when one is all ready for whatever questions you are going to ask him, what sort of connection is there between the subject and machine?

A. There are three components. The pneumograph component requires a hose connection from the instrument to a convoluted tube. That tube is held in place by a little chain reaching around the chest. That is fastened in the visceral section of the body.

Q. You put that around the subject?

A. Yes, sir, to record the breathing.

From the cardial section of the machine, the second component, there is a hose leading to a little wrist cuff that fastens around the wrist the same as a physician would use to check blood pressure.

The third component of the instrument is a psychogalvanometer.

Q. Tell us about that.

A. From the instrument there is a little wire running out to two metal clips of German silver, and those two clips are placed on the fingers with tape around those two to hold them together. That is the connection between the person and the instrument.

329 Q. Now, has he got both hands—let me ask you this: I believe you said there was some sort of hold on one arm with suction pull. That is for the pulse?

A. Blood pressure cuff.

Q. These two connections other than the one that is around the visceral section, are they on one arm, on one separate arm?

A. Usually the blood pressure is on the left wrist. The metal clip is on the right-hand finger.

Q. Now, as a matter of fact, Mr. McCarty, then you ask the individual some questions, is that right?

A. Yes, sir.

Q. Before you ask an individual any questions, you are pretty thoroughly briefed about the alleged charge, are you not, by the other officers?

A. Most times I am. I want all the information that I can get from the investigating officer.

Q. So that in large measure your questions are predicated on the information or the detail of the crime, isn't that so?

A. Yes, sir.

Q. Now, I believe you said that you were with this man for about an hour and a half.

A. Yes, sir.

Q. How long were you with him in that room before you attached that machinery to him?

330 A. I would estimate it about 20 minutes, possibly 25 minutes.

Q. Now, Mr. McCarty, you were talking to him all that time?

A. Yes, sir.

Q. Now, after you disconnected the instruments from him, then you had some further conversation with him?

A. Yes, sir.

Mr. BRYANT. Will Your Honor indulge me one second?

If Your Honor please, I notice that the defendant's mother is in the court room. I would like to have the Clerk tell her to go to the witness room.

The COURT. She is a prospective witness. She should retire to the witness room.

Mr. BRYANT. Will you designate her as Mrs. Mallory?

The DEPUTY CLERK. Mrs. Mallory, will you please step forward and retire to the witness room?

(Mrs. Mallory complied.)

By Mr. BRYANT:

Q. Now, Mr. McCarty, I believe you said that this man made a completely voluntary statement to you. Let me ask you this question: After you detached these instruments from him, did you continue to talk to him?

A. I continued to talk with him, discussing the case, and he continued denying any guilty knowledge in connec-
331 tion with the case for a short period of time.

Q. Did you—excuse me, go ahead.

A. With my assurance to him that the only thing we as police officers working on this case were interested in was truth and fact. I approached him with sympathy and expressed sympathy toward him.

He finally in discussing said that he might or could have done it. Then said, I will tell you exactly what happened.

Q. Now, Mr. McCarty, can you give us a little bit more detail about this sympathy? You said that you expressed sympathy toward him. Did you say that?

A. Yes, sir.

Q. Now, let me ask you this question: Was that expression of sympathy a device, or were you actually sorry for him?

A. I was sorry for him now, then, and I am now. And it was sincere.

Mr. BRYANT. Your Honor, will you indulge me one second?

The COURT. Yes.

* * * * *

407 ANDREW R. MALLORY, the defendant herein, having been first duly sworn, assumed the witness stand and testified as follows:

* * * * *

408 Cross-examination by Mr. MCLAUGHLIN:

Q. You say that you remember seeing Mrs. O'Keane
409 in the apartment?

A. That is correct

Q. And was that downstairs in the basement apartment?

A. That's right.

Q. Now, you had been living at that apartment, had you not?

A. Yes, sir.

Q. How long had you been living at that apartment?
A. I cannot say definitely.
Q. What?
A. I cannot say definitely.
Q. Give us some idea of how long you were living at the apartment.
A. I would say it was between six and seven weeks.
Q. Six and seven weeks?
A. That is correct.
Q. Where did you come from?
A. I came from Greenville, South Carolina.
Q. When you came up to this address on 12th Street, who was living at this address?
A. My brother Luther Mallory.
Q. Luther Mallory?
A. Yes, sir.
Q. And when you arrived at that apartment, who else was living with your brother Luther?
410 A. My sister was up here and his two sons, I think both of them, three sons at that time I think were living there.
Q. Were living at this apartment?
A. That's right.
Q. That's 1223 12th Street, Northwest, is that right?
A. That's right.

* * * * *

423 Q. When you returned, what time would you say it was, when you returned back to the apartment?
A. Well, I was out about maybe ten minutes.
Q. You were out of the house about ten minutes?
A. That's right.
Q. So that would be what, it would be about twenty minutes to six?
A. That's right.
Q. Is that right?
A. That's right.
Q. Do you know how you arrived at that time?
A. I said I was out about ten minutes.
Q. And then if you were out about ten minutes, what time would it be when you came back?

A. I didn't say no definite time I left. It was between I would say twenty-five after five and six o'clock when I left the house.

424 Q. What time would you say it was when you came back?

A. I don't know.

Q. What?

A. I don't know.

Q. How long had you been out?

A. About ten minutes.

Q. Does that give you any idea when it was you came back?

A. I don't know definitely what time I went out.

Q. I don't mean definitely. Just do a little calculating.

A. I wouldn't say either way.

Q. Either way.

A. But it was before six o'clock.

Q. And when you came back at that time, did you see anybody in the apartment?

A. No.

Q. You were in there all by yourself, is that right?

A. That's right.

Q. Was it at that time that you saw Mrs. O'Keane?

A. That's right.

Q. Now, just tell us, how did you come to see her?

A. I think I was in the kitchen when——

Q. You have to keep your voice up, Andrew. You are dropping it, see?

A. I was in the kitchen when somebody knocked at the

425 door. So I goes to the door and this lady was there, which I didn't know her name at that time. She asked me did I know where they kept their hose. I told her no. So she said that she had her own and she wanted the other one taken off. So I taken it off for her and put it over in another tub. Then I goes back on in the room.

Q. Do you remember how she was dressed at that time?

A. Yes, sir.

Q. How was she dressed?

A. She had on a pair of blue shorts and a pink blouse.

Q. At that time, did you see any wash that she had brought down?

A. Yes, I did.

Q. What did she bring the wash down in?
A. I don't know that.
Q. Where was the wash?
A. Well, it was—it comes out the door on this side. The wash was here, and the washer here [indicating], so I goes around this way. She was standing back over here.
Q. After you fixed the hose on the faucet for her, what did she say to you?
A. She thanked me.
Q. Do you recall what you said to her?
A. Not the exact words; no.
Q. Not the exact words. Well, what was it, something
426 like "Don't mention it," or something like that?
A. It was something like that. I wouldn't say definitely what it was.
Q. And then after you did that, where did you go?
A. I went back in the house.
Q. Back in the apartment?
A. In the apartment.
Q. And when you went back in the apartment, whereabouts in the apartment did you go?
A. The middle room.
Q. The middle room?
A. That's right.
Q. Is that the bedroom?
A. That's the living room and bedroom combined.
Q. What clothes did you have on, that is, when you went—what did you do in the bedroom?
A. What did I do?
Q. This combination you say, living room and bedroom.
A. I sat down.
Q. On what did you sit?
A. Well, I guess some people call it—I don't know what it were. It wasn't a bed, and I have never saw it up, so it might have been a studio couch, but—
Q. Combination affair?
A. That's right.
427 Q. And you sat on that, you say?
A. That's right.
Q. When you sat on it, how long did you sit on that?
A. I can't say definitely.

Q. What?

A. I cannot state definitely.

Q. Did there come a time when you got up from where you were?

A. Sure.

Q. All right. When you got up from where you were, where did you go?

A. In the kitchen.

Q. In the kitchen?

A. That's right.

Q. And what did you do in the kitchen?

A. I got me a drink out there of what was left of it. That's the part that we missed.

Q. What part did we miss, Andrew?

A. The part between 2:30 and 5.

Q. Well, all right. Tell us about it.

A. All right. It was—I won't say definitely, but I hadn't been back from the store for too long when there was a knock on the door. So I goes to the door, and there was a guy standing out there. He asked me was Leo in. I told him no. He asked me was Roosevelt in. I told him no. He said,
428 "Then you must be Andrew."

I said, "That's right."

So he told me his name was Joe. That's all he said, "Joe." Then I said, "Come on in." So he came on in.

We went on back in the living room and sit down. He asked me did I drink. I told him yes, but I didn't make it a habit. So he asked me did I want anything.

I told him yes. So he goes out to the back door and goes up on the corner of 11th and N. At least that's the way I figured he went. There was a whiskey store on the corner of N and 11th and also on 11th and M. So therefore I can't say which one he went to.

Q. Sure.

A. But anyway he was gone for approximately five, maybe six minutes. When he came back he had a pint of whiskey. So I had already gotten the glasses and set them on the table there in the room. He asked me did I have anything to chase it with. So I thought about the Pepsi-Cola that I had. So I told him, Yes, I had a Pepsi-Cola. So I gets up and goes in the kitchen and gets it. And when I come back the whiskey is poured and we began drinking.

And that is the last thing I remember up until around five o'clock.

Now, in the earlier testimony Leo said he got some
429 clothes from me. That I do not remember.

Q. All right. You do remember seeing Mrs. O'Keane in the basement, is that right?

A. Approximately six o'clock.

Q. Approximately six o'clock?

A. That's right.

Q. That was after you drank the whiskey, is that right?

A. As I say, I don't remember anything until around five o'clock.

Q. All right. Let's take five o'clock.

A. So therefore it must be—I don't know whether I was doped or what. And also in those pants, I had not had on those clothes.

Q. All right. After you saw Mrs. O'Keane in the basement and you fixed the hose, you say you went back to the apartment and sat on this combination daybed?

A. That's right.

Q. How long did you sit there?

A. I couldn't say.

Q. Did you go out of the apartment?

A. I didn't go out of the apartment.

Q. You did not go out?

A. No.

Q. All right. What did you do in the apartment?

A. Well, I sit there and listened to the radio and
430 finished drinking the Pepsi-Cola, as I said.

Q. How long did you stay there?

A. Up until—I don't know exactly what time it were—that Leo did come in and he did say something to me, but I don't recall what it were. But anyway, he asked me where I was going, and I told him around on Tenth Street. So I left. And I goes around and goes on up, and that's when I met Luther.

Q. You met Luther then?

A. That's right.

Q. How long did you stand there talking to Luther?

A. I would say around five minutes.

Q. Was that before you went to Tenth Street or on your return?

A. I was on my way there.

Q. You were on your way?
A. That's right.
Q. And then did you go to Tenth Street?
A. That's right.
Q. And then did you return?
A. That's right.
Q. When you returned to the apartment, who did you see at the apartment?
A. Well, at first I only saw my brother and Roosevelt, which is Luther R., and I don't recall whether Leo was there
431 or not. But anyway—and James, James was there.
Q. That's the boy fourteen?
A. That's right.
Q. By the way, Andrew, what grade did you go to in school?
A. Seventh.
Q. The seventh grade?
A. That's right.
Q. Go ahead. When you came back you say you saw the other boys?
A. I don't recall seeing Leo.
Q. What happened when you came back to the apartment?
A. Well, as I was going down the stairs, before I went in the apartment, I saw I guess you call them squad cars.
Q. Scout cars?
A. That's right.
Q. How did you know it was a scout car?
A. How did I know?
Q. Yes.
A. I am not out in the country. I live in the city, too.
Q. Oh. Go ahead.
A. Well, anyway it was parked out in the front. And as I went downstairs I saw the water and the clothes were still there on the floor. And I had a key. So I opened the
432 door and goes on in. And everybody was back in the back room, so I goes on back there. And I don't remember now who was the first person spoke, but anyway James told me that some woman had been attacked. And then my brother speaks up and says that the man had on a white hat. Well, I had on a white hat myself.
Q. You had on a white hat?
A. That's right.
Q. How about the color of your coat?

A. I had on this same coat here, and the same pants I have on now.

Q. Didn't you have a brown coat on?

A. No, sir.

Q. What clothes did you send to the cleaner's that day?

A. That's exactly what I don't remember. Leo said he got them, but I don't remember giving him no clothes.

Q. That's when you were drinking that whiskey?

A. It was after. It would have to be if he came there. And he said he was there at 5:30, and I don't remember.

Q. When you came back and you saw this crowd around and all this discussion, what happened after that?

A. He told me that this other man had on a white hat. So I said, "I have on a white hat." So I said, "I had better go up and show them my hat."

433 So my brother said, "No, don't you go up there."

So about that time—I don't know whether the officer was down there when I went in there or not—I saw him for the first time there. So he comes in and him and my brother begin talking. What they were talking about I don't know.

Q. Did you leave the apartment?

A. I did.

Q. What time would you say it was that you left the apartment that night of April 7th?

A. I don't know.

Q. What?

A. I don't know. I couldn't say.

Q. Do you know where in the apartment Mrs. Poropat lives, Apartment 4 there on the first floor front?

A. I don't know any of those people that live there.

Q. You don't know any of them?

A. That's right.

Q. In other words, you never did any janitor work around the apartment while you were there?

A. No.

Q. Can you tell us the approximate time that you left the apartment?

A. You mean at night?

Q. Yes, that night after you heard what happened.

434 A. I would say around maybe 8:30 or 9 o'clock.

Q. Where did you go?

A. I couldn't tell you that. I mean ——

Q. What?

A. It was—I couldn't tell you that. That's something that I must keep to myself.

Q. Oh, it's confidential?

A. That's right.

Q. All right, I won't go into it then. But you remember where you went, don't you?

A. Sure.

Q. And you remember everything that happened there, too, don't you?

A. I don't.

Q. Just——

A. As I told you——

Q. I will withdraw that question. I won't ask you about something that is confidential.

Do you remember what time you came home that night?

A. I came home that night?

Q. Yes.

A. I never came back there.

Q. Where did you go?

A. As I told you, I cannot tell you.

435 Q. Let me ask you this in a general way: Did you go to another house?

A. That's true.

Q. And was the house on another street?

A. That's right.

Q. And did you stay there that night?

A. No.

Q. How long would you say you stayed at that house?

A. Up until around one o'clock.

Q. One o'clock. All right. And then when you left that house, did you go to another house?

A. That's right.

Q. And did you stay at that house all night?

A. For the rest of the morning, yes, up until around 11 a. m.

Q. Till about 11 a. m.?

A. That's right.

Q. Let me ask you this general question: Was that house on Owens Street?

A. No.

Q. Is that the house that was on Ingram Street?

A. I don't know the street, but it was my aunt's. She is sitting back there.

Q. Oh, your aunt's house. And you say you left that house about 11 o'clock in the morning?

436 A. That's right.

Q. Where did you go from there?

A. I went to Owen Street.

Q. Owen Street?

A. That's right.

Q. Did you stay at Owen Street until 2:30 that afternoon?

A. I stayed there until the officers arrested me.

Q. And that was about 2:30, wasn't it, Andrew?

A. I don't know.

Q. Well, did you say it was after 11 o'clock, at noon?

A. I am quite sure it was after twelve.

Q. After twelve. You remember the policeman who arrested you, don't you? I mean, you saw him here?

A. Yes, I saw him, but I don't know his name.

Q. Do you remember when he took the stand his name was Yuter?

A. I remember now.

Q. You remember now.

Then, when he arrested you, where did he bring you?

A. To the No. 1 Precinct, I think it was, headquarters.

Q. No. 1. That's over here on Indiana Avenue?

A. I couldn't tell you the street.

437 Q. Well, you went in and you went up in an elevator, is that right?

A. That's right.

Q. And when they brought you up there, what room did they bring you to, do you remember?

A. The first place I went, as far as I can recollect, was where they fingerprint you and photograph you.

Q. And that's the bureau of identification, they call it, is that right?

A. I guess so.

Q. And do you remember when you were brought in there, what you saw in there?

A. No, I don't.

Q. Can you tell us some of the equipment they had in there?

A. I am afraid I can't.

Q. Did they take your picture?

A. Yes.
Q. What?
A. Yes.
Q. Did they fingerprint you?
A. They did.
Q. And did they put you up against the wall to see how high you were, or how tall, rather?
A. I think they did.
438 Q. And then did they put you on the scale, a weighing scale?
A. I think so. I am not quite sure, but I think they did.
Q. They did all those things. Now, while you were there, did they bring you out of that room, the bureau of identification, after they fingerprinted and photographed you?
A. That's right, they did.
Q. Do you remember what room they brought you to?
A. I don't.
Q. What?
A. I don't remember what room it was. But I know they carried me out of that room into another one.
Q. When they carried you out of that room, do you remember being in a big long hall?
A. I do.
Q. When you went out of that room in this long hall, do you remember going to the office on the opposite side of the hall? In other words, you have to cross the hall to get in there.
A. I went into the room, but I don't think it was an office.
Q. What?
A. I went in a room across the hall, but I don't think it
439 was an office.
Q. You don't think it was an office. Do you remember it had these blue steel desks? Is that what they call them?
A. There wasn't any desk in the room.
Q. There wasn't any desk? What was in the room?
A. Benches along the wall.
Q. Benches along the wall?
A. That's right.
Q. Did you see a desk right in front of you?
A. I didn't.
Q. Behind a rail?
A. I did not see a desk.
Q. You didn't see a desk.

Now, after you were brought in there, did there come a time when you saw Luther and Milton Mallory?

A. If I am not mistaken they were in there when I went there.

Q. Oh, they were in there when you went in?

A. That's right, my brother were also.

Q. And when you saw your brother—that's the father of those two boys, is that right?

A. That's right.

Q. Did you sit down with them?

A. That's right.

Q. You all sat around together?

440 A. That's right.

Q. The police questioned you, did they, at that time?

A. That's right.

Q. Do you remember what police officer questioned you?

A. I don't remember his name, but I saw him on the stand yesterday.

Q. Do you remember whether it was the big fellow, Elliott?

A. It wasn't any big fellow.

Q. Was it Mackie? Well, it was one of those who testified?

A. I don't remember the guy's name.

Q. You don't remember the guy's name. All right. Then you were questioned for how long?

A. I would say around 30 or 45 minutes, between 30 and 45 minutes.

Q. While you were there with Milton and Luther, did there come a time when there was a discussion about a lie detector test?

A. I don't think there were in that room. I am not sure.

Q. It wasn't in that room; right?

A. I am not saying definitely, but I don't believe it were.

Q. How long did you stay in that room before you

441 went to another room?

A. I would say about two and a half hours. Before they questioned me they told me that my brother said that I was the man. And they asked me, Wasn't I. And I told them, No. And they would kill me before they got any statement concerning that as far as my guilt was concerned.

Q. As far as your what?

A. Guilt.

Q. In other words, you were the one that used the word. You said, You can kill me. Is that right?

A. That's right. That's right.

Q. But no one laid a hand on you, did they?

A. No.

Q. What?

A. No.

Q. Then they questioned you, and then did they take you out of that room?

A. They did.

Q. Where did they bring you from that room, Andrew?

A. I don't know the name. I think it's what they call the—I don't know what you call it.

Q. If I mentioned that they call it the general assignment room?

A. It wasn't that room, I don't think.

Q. Was it the sex office?

442 A. I think that's it.

Q. When you went in the sex office did they also bring in Milton and Luther along with you?

A. That's right.

Q. So that the three of you were practically together all afternoon, is that right?

A. That's right.

Q. All together.

And then when you went in the sex office, did they question you in there?

A. Not that I can remember.

Q. Did you have some discussion in there about taking a lie detector test?

A. I think that's where we were when they mentioned the lie detector test.

Q. And Luther was present, and Milton, and your brother was present, wasn't he?

A. I don't recall whether he were present or not.

Q. Did he come in later, do you recall?

A. I don't recall.

Q. While you were in the sex squad room, everybody agreed to take the lie detector test, isn't that right?

A. That's right.

Q. Do you remember whether or not they called a man in that gave the lie detector test?

443 A. I don't recall whether they had to or not. I don't know whether he was there or where he were.

Q. Let me ask it this way, Andrew: Did you hear any talk among the police that the man who gave the lie detector test wasn't there?

A. No, I didn't.

Q. How long did you wait in that room before someone of the three of you left? Do you understand that question?

A. Sure I understand.

Q. All right. You can answer it.

A. I would say maybe. It may have been around two or two and a half hours.

Q. Hours?

A. I am not quite sure.

Q. During that time nobody questioned you, did they?

A. Not that I can recall.

Q. In other words, they were just waiting for the lie detector man, is that right?

A. That's right.

Q. And then there came a time when they brought one of you out, isn't that right?

A. That's right.

Q. Who was the first one out?

A. Milton.

Q. Milton?

444 A. That's right.

Q. How long did Milton stay out of the room?

A. I couldn't say.

Q. Can you give us some idea, maybe?

A. No, I can't.

Q. Would you say it was 45 minutes?

A. As I said, I wouldn't say either way because I don't know.

Q. You don't know?

A. That's right.

Q. All right. When he came back, who went out next?

A. Luther.

Q. Luther?

A. That's right.

Q. And when Milton came back, did he come back in the room where you were?

A. That's as far as I can go on that.

Q. Do you remember how long Milton stayed out of the room?

A. I told you I didn't.

Q. You did not?

A. That's right.

Q. Do you remember Milton coming back in the room?

A. That's right.

Q. All right. And how long would you say he had
445 been out of the room?

A. As I say, I don't know.

Q. Now, after Milton came out of the room, came back into the room, where did you go?

A. I didn't go any place.

Q. Didn't they take you down to the lie detector?

A. I don't know.

Q. What?

A. I don't know.

Q. Well, did you stay in that room in the sex squad office?

A. I don't remember anything from around 6:30 until the next morning.

Q. In other words, you don't remember anything from the time they took Milton out of the room for the lie detector, is that right?

A. Let me tell you this, then you take it from there: They brought us something in. I don't know what it were. But anyway, I ate part of it and drank some of the coffee. And so help me God, that's the last thing I remember until the next morning.

Q. You are telling us they put a Mickey in that?

A. I don't know what it were.

Q. What?

A. I don't know what it were, but I don't remember
446 anything until the following morning.

Q. Is it your idea that there was something in that food or something in that liquid?

A. That's what I believe.

Q. That's what you believe?

A. That's right.

Q. So the fact that you don't remember anything after that, you blame it on something that you ate or drank, is that right?

A. That's my belief.

Q. That's your belief. All right.

And prior to them giving you something to eat and something to drink—and by the way, how many times did you get something to eat and something to drink?

A. Only one time.

Q. Only one time?

A. That's right.

Q. Well, all right. Now, let us take it up until that time, Andrew. Did any of the police strike or beat you in any way?

A. No.

Q. And did the police up until you ate this food and drank this beverage, whatever, why you had been treated kindly by the police?

A. That's right.

447 Q. And there's no one that tried to force you to do anything, did they?

A. Well, I have to answer that question this way: During the time that they was questioning me that afternoon, they made some promises, but I still said I didn't do anything whatsoever about what they were talking about.

Q. All right. Now, let's hear the promises they made to you, Andrew.

A. They said it would go as light—they said they would talk for me and it would go as light as possible on me. But I said that I didn't know what they were talking about.

Q. None of them ever told you that they would let you go free, did they?

A. No.

Q. In other words, they never told you they would put you on the street?

A. No.

Q. What?

A. No.

Q. And in those conversations with you, weren't they, did they say to you, Now, if you tell the truth, we will try to go as light on you as we can?

A. They said, if you come and tell us that you done this thing, we will make it as light as we can on you. And I didn't—

448 I told them I didn't know what they was talking about. And that's when I made the statement that, "You would have to kill me first." Then I couldn't make no statement.

Q. Then you couldn't?

A. And I didn't have any statement to make in the beginning.

Q. You didn't have any to make in the beginning. I just want to get it straight. No one laid a hand on you up until this time?

A. As I said, no one laid a hand on me any time that I know anything about.

Q. And do you remember where you slept that night?

A. As I said before, I don't remember anything until the next morning. I know where I were when I woke up.

Q. All right. Where were you when you woke up?

A. I was in a cell.

Q. What time was that?

A. I couldn't say.

Q. What?

A. I couldn't say.

Q. Do you remember Officer Mackie?

A. No.

Q. You never saw him before in your life?

A. Not that I know anything about.

Mr. McLAUGHLIN. Have you got that statement?

The DEPUTY CLERK. Yes.

449 By Mr. McLAUGHLIN:

Q. Now, I show you, Andrew, Government Exhibit No. 6 and I will ask you to look at the last page. Is that your name?

A. That is my name.

Q. Is that your signature?

A. No.

Q. You deny that it is your signature?

A. I deny it.

Q. Now, here are some initials here on the first page. What is it? What does it say?

A. A. R. M.

Q. A. R. M. Now, whose initials are those?

A. Those are my initials.

Q. Those are your initials?

A. That's right.

Q. On the first page, is that right?

A. That's right.

Q. Why did you initial that?

A. I don't remember initialing anything.

Q. You don't remember?
A. That's right.
Q. But you don't deny that those are your initials?
A. I don't deny that those are my signatures.
Q. And that——
450 A. And that is my initials.
Q. And that is your handwriting, isn't that right?
A. It looks like that. I know this here is not my handwriting here [indicating].
Q. Let's take it one at a time. This here on the first page, the initials, A. R. M.
A. That's my initials.
Q. That's your initials. Well, in addition to your initials, did you write that? Is that your handwriting?
A. It looks something like that, but I don't remember signing it.
Q. You don't remember?
A. That's right.
Q. I will show you page 2 on Exhibit No. 6 and ask if you can identify those initials.
A. They are mine also.
Q. And those initials are what?
A. A. R. M.
Q. Did you put them there?
A. I don't remember.
Q. But that is your writing, is it?
A. As I say, it looks like it.
Q. It looks like it. And this initial here, this name here, A. R. M., Andrew Mallory, you say that's not yours?
A. It don't look like it.
451 Q. It don't look like it. All right, Andrew.
Showing you Government Exhibit No. 6, and on page 2, I will show the initial A. R. M. You say that is your initials and that is your handwriting?
A. That's right.
Q. All right. Now, showing you Government Exhibit 6 and page 3, I will show you "Andrew R. Mallory." You deny that's your signature?
A. I say I don't remember signing it.
Q. Do you deny that that's your signature?
A. I said it didn't look like my signature.
Q. What?
A. I said it didn't look like it.

Q. You deny that it is yours, that you didn't sign it?
A. I said I don't remember signing it.
Mr. TINNEY. Speak a little louder.
The WITNESS. I said I don't remember signing it.

By Mr. McLAUGHLIN:

Q. You don't remember signing it?
A. That's right.
Q. Look at the "R." in A. R. M. on page 2, and the "R." on page 3.
A. I am looking at that.
Q. And I ask you if those weren't made by the same person.
452 A. They are identical.
Q. In the statement, page 1, it says, "I went on back into the apartment and made a pitcher of ice water. I turned the radio up and went back into the same bedroom, I was at first. Then Leo came and I asked him if I had a suit of clothes that he could wear Sunday. So I had a brown checkered and a blue one."
Have you got a brown checkered?
A. I have a brown check and a blue suit.
Q. "And he said that he would put the brown suit and the one he wanted to wear in the cleaner's. So he asked me if I had anything to put in for me to wear and I told him yes. I got a pair of blue checkered pants."
Do you have a pair of blue checkered pants?
A. Not that I know anything about.
Q. Have you got a maroon shirt?
A. Well, I have a couple of maroon shirts.
Q. "Then I got the grey coat."
Do you have a grey coat?
A. I only have this one [indicating].
Q. "But I changed and told him to put the one in—I changed about the blue checkered pants and told him to put the plain blue pants. Leo left to go to the cleaner's."
Who told the police that?
A. They undoubtedly got it from him.
453 Q. Got it from whom?
A. From Leo.
Q. On page 3 it says this: I will start a little ahead so as to get the continuity.

"I went back through the boiler room into the bedroom and laid down for about ten or fifteen minutes. I don't know—before my brother came in. I was changing clothes when he came in. Leo came in right after Luther."

Do you remember that?

A. No.

Q. Do you know where the police got that information?

A. No.

Q. Did you tell the police that?

A. No.

Q. Now, Leo is who?

A. He is my nephew.

Q. What?

A. He is my nephew.

Q. How old is he?

A. I don't know.

Q. Was he purchasing an automobile?

A. Was he purchasing one?

Q. Yes.

A. I don't know.

454 Q. Did he talk to you about a contract he had with a used car dealer?

A. No, he didn't.

Q. Didn't you tell the police "Leo had gotten a contract from a used car dealer, and he asked me to read it for him"?

A. I did not tell them any such thing.

Q. You did not tell them that.

Do you remember Mrs. Smith, the lady who testified here?

A. No.

Q. Do you remember her testifying that she took this down on the typewriter?

A. I remember her testifying.

Q. You deny that happened?

A. I deny that I know anything about any such thing happening.

Q. You what?

A. I say, I deny, that I know anything about any such thing happening.

Q. In other words, it could have happened, but you don't remember it, is that right?

A. I don't remember.

Q. What?

A. I don't think my mind is—I mean I am going to
455 do something and don't know anything about it.

Q. Well, all right. After you say you are going to do something—after you had this eat and drink that the police brought you, you say that after you finished that your mind went a blank, is that right?

A. Undoubtedly I passed out.

Q. You passed out. So that you didn't remember anything until the following morning, is that right?

A. That's right.

Q. What?

A. That's right.

Q. You don't remember whether you signed that or not, do you?

A. That's what I said.

Q. And you don't remember whether you gave this statement to Miss Smith or not?

A. That's what I stated.

Q. Do you remember seeing Dr. Rosenberg, the little doctor who testified here?

A. I saw him yesterday I think for the first time.

Q. Do you remember seeing him?

A. No.

Q. Do you remember him asking you questions?

A. No.

Q. Do you remember him taking your clothes off and
456 examining your body to see if there were any marks or anything on it?

A. No, I don't.

Q. Now, up until the time that you ate this food and drank this liquid, whatever it was, we will call it a beverage, there was nothing the matter with your mind, was there?

A. As far as I can remember; no.

Q. No. And could you understand everything that was going on at that time—couldn't you?

A. I could.

Q. What?

A. I think there was only a few questions that I had to ask when they was questioning me around four. I think it was around four o'clock when they were questioning me.

Q. And you remember everything?

A. I don't remember everything.

Q. Well, outside of that little whiskey you had up in the apartment—I mean, there was nothing the matter with you mentally? That you couldn't remember?

A. Well, what I say on that wouldn't make any difference because I had a psychiatrist—there is no need to tell me this—that every man thinks the other person is crazy but himself. Therefore, I wouldn't say either way. But I don't think I were.

457 I have nothing further.

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465 *Proceedings of June 24, 1955*

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Colloquy between court and counsel

The COURT. Will counsel come to the bench, please?

(At the bench.)

The COURT. The Court wishes to inquire of counsel for the defendant whether in his argument to the jury he was raising the issue as to whether the confession was voluntary. I understood something was said on that point, but I don't understand that there is any evidence of involuntariness.

What is the position of counsel for the defendant on that point?

Mr. BRYANT. Well, if Your Honor please, I don't know whether the confession is in the same category as the consent to search the premises or not. I believe that there is a smattering of evidence that there was some involuntary character to it in that he was questioned for quite some time. He denied it. He went into the lie detector room. Of course, Your Honor, I take this position: I take the position that subjecting a man to a lie detector test is in itself psychological pressure. I think it is consistent with——

The COURT. But here he volunteered for the test.

466 Mr. BRYANT. Well, yes, Your Honor. I think this: I think that my defense of mental competency goes to his inability——.

The COURT. I will instruct the jury that confession must be voluntary, of course, but that there is no evidence of any physical coercion of any kind. You will concede that?

Mr. BRYANT. Yes, of course I will.

The COURT. Very well.

We will take our mid-morning recess before I charge the jury.

(Following a brief recess.)

Charge to the jury

The COURT. (Holtzoff, J.). Ladies and gentlemen of the jury: The defendant, Andrew Mallory, is on trial on a charge of rape. It now becomes your duty to determine whether the defendant is guilty or not guilty of the charge on which he is being tried.

The indictment drawn in formal legal phraseology charges that on or about April 7, 1954, within the District of Columbia, Andrew R. Mallory had carnal knowledge of a female named Stella R. O'Keane forceably and against her will.

It is the function of the Court, that is, it is my function and my duty to instruct the jury as to the rules of law that must govern the disposition of this case. You, ladies and
467 gentlemen of the jury, are bound to take the law from the Court and obligated to follow the Court's instructions as to the law, but you, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts yourselves from the evidence, and solely from the evidence introduced at this trial.

The law authorizes the Court to summarize and discuss the evidence in its instructions to the jury, and to comment on the facts and on the evidence, in order to aid and assist the jury in arriving at its conclusions, but the Court's comments on the facts and on the evidence, and the Court's discussion or summary of the evidence are not binding on you. You need attach to them only such weight as you deem wise and proper.

If your recollection or your understanding of the evidence in any way differs from the Court's recollection or the Court's understanding of the evidence, then it is your recollection and your understanding that must prevail, because as I indicated a moment ago, the final decision on the facts is solely within your domain. My instructions are binding on you only as to the law.

I shall begin my instructions by summarizing a few general principles of law that are applicable to all criminal cases, including, of course, this one. After I have done so I shall pro-

ceed to the consideration of the specific charge involved in this case.

468 First: The fact that a defendant has been indicted and charged with a crime is not to be taken as an indication of guilt, and no inference is to be drawn against him from that fact. An indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

Second: Every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial.

Third: The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty. I repeat, the burden is on the Government to prove the defendant guilty beyond a reasonable doubt, but proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its very name implies, it meant a doubt based on reason, and not just some whimsical speculation or some capricious conjecture.

I can explain the meaning of the phrase "proof beyond a reasonable doubt" in a simple everyday phraseology.

469 Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all of the evidence you can say to yourself that you are not satisfied with the defendant's guilt, then you have a reasonable doubt. But, on the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendant's guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the defendant, you will consider and weigh the testimony of all the witnesses who have testified before you, as well as all the circumstances concerning which testimony has been introduced. Circumstances are frequently very illuminating and cast a light upon the oral testimony.

You are the sole judges of the credibility of witnesses. In other words, it is for you and for you alone to determine whether to believe any witness, and the extent to which any witness should be credited.

470 In reaching a conclusion as to the credibility of any witness, and in weighing the testimony of any witness, you may consider any matter that appears to you to have a bearing on the subject. For example, you have a right to consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether the witness impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, whether the witness has any motive for not telling the truth, and whether the witness has any interest in the outcome of this case.

If you find that any witness testified falsely as to any material fact concerning which the witness could not have reasonably been mistaken, you are then at liberty, if you deem it wise to do so, to disregard the entire testimony of that witness, or any part of the testimony of that witness.

This brings me to a consideration of the specific charge involved in this case. The charge is rape.

Rape is defined in the District of Columbia Code as "Having carnal knowledge of a female forceably and against her will."

The words "carnal knowledge," are synonymous with sexual intercourse. In plain language it may be defined as having sexual intercourse with a female forceably and against her will.

471 Rape or carnal knowledge comprises penetration of the sexual organ of the female by the sexual organ of the male. The slightest penetration is sufficient, and emission is not required.

The law does not permit a conviction on the charge of rape on the basis of the testimony of the complaining witness standing alone. Corroboration of her testimony is required by law. Such corroboration, however, need not be by eye witnesses.

Eye witnesses can hardly ever be obtained in regard to such an offense as is charged in this case.

Corroborating circumstances may be sufficient corroboration. There may be testimony of circumstances which if believed by you, you may, if you deem it wise and proper, to consider in the nature of corroboration.

Now, that brings me briefly to the evidence in this case. I shall briefly summarize the evidence introduced by both parties.

Mrs. O'Keane, the victim and the complaining witness, testified in detail how she was sexually assaulted in the laundry room in the basement of the apartment house in which she lived while she was hanging her laundry there.

Now, to corroborate her testimony that she was raped, the Government introduced the following evidence:

First, that she made an immediate complaint, namely, that she ran upstairs and called out to her husband, "Call
472 the doctor. I have been raped."

The fact that the victim of an alleged rape makes an immediate complaint may be considered by the jury in its discretion as a corroborating circumstance.

Second: There was testimony on the part of her husband and a neighbor and police officers and a physician that she was hysterical, that she was weeping, and disheveled, covered with coal dust, had marks on her throat and scratches on her body.

Then the Government introduced evidence that she was examined shortly thereafter by a physician of the District of Columbia General Hospital who testified that her genital organs were irritated, had been subjected to trauma, which is a medical term for physical violence, and that she had a discharge from her private organs.

He also testified that the patient was nervous and distraught, had abrasions on different parts of her body, and a lump on her head.

Mrs. O'Keane identified on the witness stand the defendant as the person who raped her. That again has to be corroborated. And by way of corroboration, and with the view to corroboration, the Government introduced evidence tending to show the following facts:

First, that the defendant was living in the janitor's
473 apartment, next to the laundry room, and was there on the afternoon or evening on which the rape was committed.

Then the Government offered evidence tending to show that the defendant made an admission, giving all the details that he committed the offense, to Sergeant McCarty of the Metropolitan Police Department; that then he repeated his story to Detectives Tate and Mackie; that later at police headquarters he was confronted with Mrs O'Keane and admitted in front of her that he assaulted her sexually.

Mrs. French, a neighbor of Mrs. O'Keane, was present and testified to that, as well as the police officers.

Finally, the Government introduced a written statement said to have been dictated by the defendant to the police and which was typewritten from his dictation and which he signed in the presence of the witnesses. This statement in which the defendant admits that he committed the offense and described all the details has been read to you.

The defendant, on the other hand, says he doesn't remember anything that happened that evening at police headquarters, and does not remember making the statement or dictating the written statement, or signing it, as the Government contends.

It is for you, ladies and gentlemen, to determine what the facts are, and where the truth lies.

Now, I want to say this, as to confessions: The law
474 admits in evidence a confession if it is freely and willingly made because human experience shows that a confession freely and willingly made is likely to be reliable. Ordinarily a person does not admit that he has committed a crime unless that admission is true.

The situation is otherwise, however, if a confession or admission is obtained by duress or by coercion, physical, mental or moral pressure, or as a result of inducement—if a confession or an admission is obtained by any of these means, it must be rejected and disregarded by the jury.

Now, there is no contention here of any physical coercion of any kind. In fact, the defendant testified in answer to questions, that no one struck him or laid a hand on him, or ill treated him in any way. He testified that he was treated kindly by the police, and that he was given food at the proper time.

Whether this confession is voluntary in the light of all the circumstances is for you to determine.

Now, there is still another issue in this case. It is claimed by counsel for the defendant that the defendant did not have

the mental capacity to commit the crime with which he is charged, and therefore should not be held responsible for it because it is alleged that he was of unsound mind at the time that the crime was committed.

475 If you find this to be the case then your verdict should be not guilty on the grounds of insanity. Your verdict should expressly state in that event that you find the defendant not guilty on the ground of insanity, and not merely not guilty.

It is indeed a rule of law that in certain instances an insane person is not responsible for his acts. In order to be responsible for his acts the person must have the mental capacity to commit the act with which he is charged. It isn't, however, in every case in which the accused is suffering from some mental abnormality or some mental ailment or some mental defect that he is not to be held responsible for his crime. There are many abnormal persons whom the law holds responsible in certain instances for a crime that such a person commits. Obviously there are good reasons for this rule of law. In order not to be held responsible for his acts, and to be found not guilty on the ground of insanity, the following two elements must appear:

First, it must appear that the defendant at the time when the offense was committed was suffering from some mental disease or some mental defect. Or, to put it in a somewhat different way, he must have been suffering from a diseased or defective mental condition at the time that the crime was committed, not at any later time, not at the time of the trial, but at the time that the crime was committed.

Second, it must appear that the crime was the product of this mental disease or mental defect.

476 If you reach the conclusion that the defendant was suffering from a mental disease or mental defect at the time the crime was committed, and also that the criminal act was the result or product of the mental disease or mental defect, you must bring in a verdict of not guilty on the ground of insanity.

On the other hand, if you are convinced beyond a reasonable doubt either that the defendant was not suffering from a mental disease or mental defect, or even if he were so suffering at the time of the commission of the offense, that the crime was not the product or result of a mental disease or mental defect, you

may find him guilty, provided, of course, you are also convinced beyond a reasonable doubt that he committed the act with which he is charged.

Of course, every person is presumed to be sane unless and until the contrary appears. This presumption is founded on human experience. This presumption does not mean, however, that the burden of proof is on the defendant to prove insanity. If the defense offers some evidence that the defendant was legally insane at the time of the commission of the offense, the presumption of sanity vanishes from the case. The burden is then on the Government to establish the sanity of the accused.

In other words, on the issue of insanity or mental incapacity, as it is otherwise called, just as on every other
477 issue in the case, the burden of proof is on the Government, and that burden must be sustained beyond a reasonable doubt.

Now, then, briefly what is the evidence on the issue of mental capacity? Dr. Rom, a psychiatrist, testified that he examined the defendant in July of 1954, three months after the rape was committed, and that he found as a result of a single examination, lasting about an hour, that the defendant was then of unsound mind. He further expressed the opinion that the illness had existed for some time previously, and that therefore the defendant had been of unsound mind in April. But the Doctor added that he could not say so definitely, as he did not examine him in April.

He further testified that in his opinion there is a relation between the mental ailment and the crime.

Now, this expert testimony is admissible and should be weighed and receive consideration, but the expert testimony is not binding on you. It is intended merely to aid and assist you. The decision as to whether the defendant was mentally competent to commit the crime must be made by the jury, and not by the experts.

In reaching that conclusion the jury not only may but should consider all the other evidence in the case, in addition to the testimony of the experts. For example, you have a right to consider the testimony of the police officers who arrested
478 and questioned the defendant, and who testified that in their opinion he acted normally and rationally and was of sound mind.

You have a right to consider the written statement made and signed by the defendant if you find that he made and signed it. And if you find that it is rational, you may consider that as evidence, as bearing on mental competency.

You also have the right to consider the testimony of Dr. Rosenberg, who of course is not a psychiatrist but a general medical practitioner, to the effect that in his opinion, and he examined him on the day that the defendant was arrested, the defendant was not suffering from any mental illness, but was normal mentally.

Now, this question is entirely for your decision on the basis of all of the evidence.

If you find the defendant guilty, you still have one more problem. The punishment provided by law for the crime of rape is either a death penalty or imprisonment for a term of years. The decision whether the death penalty should be inflicted is made by the jury. The jury has the right and the function of determining whether or not the death penalty should be inflicted in a rape case.

Consequently, if you find the defendant guilty as charged, you must then decide also whether the death penalty should be imposed. If you unanimously reach a conclusion that the death penalty should be inflicted, then you may add
479 to your verdict of guilty the words "with the death penalty." In such case, if such is your verdict, it will then be mandatory on the Court to impose the death penalty. The Court will have no discretion in the matter.

On the other hand, if you find the defendant guilty but you do not unanimously reach the conclusion that the death penalty should be inflicted, then your verdict should be simply guilty as charged, without any addition to it.

In that event, the defendant will be subject to imprisonment, which the Court will impose, but will not be subject to the death penalty.

Whether the death penalty should or should not be imposed, in case you find the defendant guilty, is entirely within your discretion, and you have a right to consider any circumstances or weigh any considerations in reaching a conclusion on that point.

Now, I repeat what I said to you at the opening of my remarks. My discussion of the evidence and the facts, and my references to the evidence and the facts are not binding on you.

They are intended merely to be of such assistance as they may be. If your recollection or your understanding of the evidence in any way differs from mine, then it is your recollection and your understanding that must prevail. I have called your attention to such evidence as appears to me to be of some
480 significance. Some of it you may not consider significant. And on the other hand, there may be other evidence to which I didn't refer that you may consider significant.

You are the sole judges of the facts, and must make your own decision on the facts. That is your function and your responsibility.

In conclusion, I want to say that you may render anyone of four verdicts: Either guilty as charged with the death penalty, or guilty as charged, or not guilty on the ground of insanity, or not guilty.

And as of course you are aware, your verdict must be reached by a unanimous vote.

Are there any objections or requests?

Mr. McLAUGHLIN. No, I have none.

Mr. BRYANT. No, Your Honor.

* * * * *

481 THE COURT. Will counsel come to the bench?

(At the bench.)

The COURT. I want to show you gentlemen a note that I have received from the jury. I think as to the question they ask on No. 2 I shall have to say that I cannot give them any such assurance.

Mr. McLAUGHLIN. That is right.

(In open court.)

482 The COURT. Who is the foreman of the jury?

The FOREMAN (Juror No. 8). I am.

The COURT. Mr. Foreman, the Court has received your note, which reads as follows:

"Have we other choice of verdicts than these four?

"One, guilty with death penalty;

"Two, guilty as charged;

"Three, not guilty by reason of insanity;

"Four, not guilty."

Now, those four are the only possible verdicts. No other verdict is possible.

Then you go on and ask:

"On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release——"

I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum, and of course I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything
483 less than the maximum.

So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged.

Now, your last question:

"May the jury have a reading of the D. C. Code re: rape?"

It reads this way:

"Whoever has carnal knowledge of a female forceably and against her will shall be imprisoned for not more than 30 years provided that in any case of rape the jury may add to their verdict if it be guilty the words 'With the death penalty,' in which case the punishment shall be death by electrocution. Provided further that the jury fails to agree as to the punishment, the verdict shall be received, and the punishment shall be imprisonment as provided in this section."

Have I clearly answered all your questions?

The FOREMAN. Yes, Your Honor.

The COURT. You may retire for further deliberation.

(Thereupon at 4:55 o'clock p. m. the jury retired to further consider their verdict, and thereafter, and at 5:15 o'clock p. m. the jury returned into the box and the following proceedings were had in open court:)

The DEPUTY CLERK. Will the foreman please rise?
484 Mr. Foreman, has the jury agreed upon a verdict?

The FOREMAN. It has.

The DEPUTY CLERK. What say you as to the defendant Andrew R. Mallory?

Verdict

The FOREMAN. Guilty with the death penalty.

The DEPUTY CLERK. Members of the jury, your foreman says that you find the defendant Andrew Mallory guilty, with the death penalty, and that is your verdict, so say you each and all?

(The jury indicated in the affirmative.)

486a [Reporter's Certificate to foregoing transcript omitted in printing.]

* * * * *

499 [File endorsement omitted.]

In United States District Court for the District of Columbia

[Title omitted.]

Verdict

Filed June 24, 1955

On this 24th day of June, 1955, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury after hearing further of the evidence and the instructions of the Court, alternate jurors Joseph A. Muldoon and Joseph E. Price, are discharged from further consideration in this case; and thereupon the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that the defendant is guilty as indicated and recommends the death penalty; whereupon each and every member of the jury is asked if that is his or her verdict and each and every member thereof say that the defendant is guilty as indicted with the death penalty; and thereupon the defendant is remanded to the District Jail.

By direction of:

ALEXANDER HOLTZOFF,
Presiding Judge, Criminal Court No. 4.

HARRY M. HULL,
Clerk.

By DANIEL J. MENCOBONI,
Deputy Clerk.

Present: United States Attorney.

By ARTHUR MCLAUGHLIN,
Assistant United States Attorney.
EVELYN SWEENEY,
Official Reporter.

500 [File endorsement omitted.]

In the United States District Court for the District of Columbia

Criminal No. 543–54

UNITED STATES

v.

ANDREW R. MALLORY

Judgment and commitment June 28, 1955

On this 28th day of June came the attorney of the Government, and the defendant appeared in person and by counsel, William A. Bryant and William A. Tinney, Esquires.

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of rape, as charged; and the jury having added to their verdict the words "with the death penalty."

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

The sentence of the Court is as follows, and it is so adjudged:

Andrew R. Mallory, you have been found guilty upon an indictment charging you with the offense of rape, and, upon the verdict of guilty, you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, Andrew R. Mallory, be forthwith taken to the District of Columbia Jail, otherwise known as the Washington Asylum and Jail, in the District of Columbia, and there be kept in close confinement; and that on the 11th day

501 November 1955 A. D., 1955, you be taken to the place prepared for your execution in the District of Columbia

Jail, and that then and there you be electrocuted according to law; and may God have mercy on your soul.

Further ordered that a certified copy of this judgment and commitment be transmitted by the Clerk of the United States District Court for the District of Columbia to the Superintendent of the aforesaid District of Columbia Jail not less than ten days prior to the time fixed in this judgment of the Court for the execution of the same.

ALEXANDER HOLTZOFF,
Judge.

502 In United States District Court

For the District of Columbia

[Title omitted.]

Motion for a new trial

(Filed June 28, 1955)

Comes now the defendant, Andrew R. Mallory, by William B. Bryant and William A. Tinney, Jr., his attorneys, and moves this Honorable Court for a new trial in the above-captioned matter, and as reasons therefore, states as follows:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the law.
3. That the Court erred in rulings on the admission of evidence.
4. That the Court erred in its instructions to the jury.
5. And for such other and further reasons as may be urged at the hearing of this motion.

William B. Bryant,
WILLIAM B. BRYANT,
615 F Street, N. W.,
William A. Tinney, Jr.,
WILLIAM A. TINNEY, Jr.,
506 5th Street, N. W.,
Attorneys for Defendant.

Certificate of service

[Omitted in printing.]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12915

ANDREW R. MALLORY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 28, 1956

Mr. William B. Bryant (appointed by the District Court), with whom *Messrs. William C. Gardner, Joseph C. Waddy* and *William A. Tinney, Jr.*, were on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Mr. Leo A. Rover*, United States Attorney at the time the brief was filed, and *Messrs. Lewis Carroll* and *Arthur J. McLaughlin*, Assistant United States Attorneys, were on the brief, for appellee.

Before PRETTYMAN, BAZELON and BASTIAN, Circuit Judges.

PRETTYMAN, *Circuit Judge:* Appellant was indicted, tried and convicted on a charge of rape. The jury added to the verdict the death penalty.[1]

Three points should be discussed. The first point concerns a confession. The rape occurred at about six

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[1] 31 STAT. 1322 (1901), as amended, D.C. CODE § 22-2801 (1951).

o'clock in the evening on April 7, 1954, in the furnace room in the basement of the apartment house where the complaining witness lived. The assailant was masked. The janitor's quarters were also in the basement and were occupied by the janitor and his wife, two grown sons, and a younger son. Appellant Mallory, a half brother of the janitor, had also been living in the janitor's quarters for about six weeks prior to the day of the crime. The investigating police officers suspected Mallory and his two grown nephews. Mallory and one of the nephews had left the place immediately after the crime. Mallory was found and arrested at about two-thirty on the afternoon following the crime, April 8th. He and the two nephews were taken to police headquarters and questioned for a short time. At some time after four o'clock all three agreed to take lie detector tests. Some delay occurred while the officer in charge of the polygraph was located. During this interval a meal was served to the three men; no further interrogation occurring during this time. Until the lie detector tests began the three men were together. They were examined one after the other, the two nephews first, and finally, at about eight o'clock, the officer began his examination of Mallory. At about nine-thirty Mallory admitted guilt, describing in detail what had occurred, and immediately thereafter he repeated his account to two other officers. Sometime after ten o'clock the police telephoned the home of the United States Commissioner. That official was not available. At ten forty-five Mallory was given a physical examination by a deputy coroner and was found to be in good physical condition. Mallory told this officer he had no complaints to make, except for a slight cold; he said he had not been struck or threatened and no promises had been made. At about eleven o'clock he was confronted by the complaining witness. Between eleven-thirty, p.m., and twelve-thirty, a.m., he dictated his confession to a stenographer, who typed it. This typewritten document was admitted in evidence at the trial.

Mallory says his confession was inadmissible under the so-called *McNabb* rule.[2] We have discussed this rule in recent cases.[3] We think the confession in the case at bar was properly admitted. The delay which occurred between the arrest and the confession was not unreasonable. The police had three suspects, and it is inconceivable that they should be required to lodge charges against any suspect until their investigation has developed with some certainty a justification for charges; provided always that the investigation is not unduly prolonged. Moreover there is no evidence that the confession was due to the delay, such as it was.

The second point concerns a statement made by the court to the jury. After the jury had been deliberating several hours it sent a note to the court. It asked, first, whether it had any choice of verdicts other than the four upon which it had been instructed; *i.e.*, guilty with the death penalty, guilty as charged, not guilty by reason of insanity, or not guilty. The second question was:

> "On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release — —"

The court said:

> "I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum, and of course I can, even if

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[2] McNabb v. United States, 318 U.S. 332, 87 L.Ed. 819, 63 S.Ct. 608 (1943).

[3] Pierce v. United States, 91 U.S. App. D.C. 19, 197 F.2d 189 (1952), *cert. denied*, 344 U.S. 846, 97 L.Ed. 658, 73 S.Ct. 62 (1952); Allen v. United States, 91 U.S. App. D.C. 197, 202 F.2d 329 (1952), *cert. denied*, 344 U.S. 869, 97 L.Ed. 671, 73 S.Ct. 112 (1952); Tillotson v. United States, — U.S. App. D.C. —, 231 F.2d 736 (1956), *cert. denied*, 24 U.S.L. WEEK 3337 (U.S. June 11, 1956); Watson v. United States, — U.S. App. D.C. —, — F.2d — (1956).

the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.

"So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged."

The third request of the jury was for a reading of the code respecting rape. The judge read the statute[1] which provides that the penalty for rape shall be imprisonment for not more than thirty years, with a proviso that the jury may add to a verdict of guilty the words "with the death penalty".

It is strongly, and with reasonable basis, urged upon us that the above-quoted statement of the trial judge was error. It is said that in the first place a possible sentence, other than the death sentence, was of no concern to the jury, and that in the second place the statement permitted the jury to select the death sentence by comparison with other possible sentences although the jury had before it no data upon which it could evaluate such other sentences. The statement, appellant urges, enabled the jury to fix the death penalty because it did not want the defendant subject to release under any circumstance at the end of ten years. It is argued that the jury should have been required to make its determination as to the death sentence solely upon the basis of data before it, that is, upon the basis of the facts concerning the crime itself.

It is true that imposition of sentence by a judge under modern procedure and the imposition of sentence by a jury rest upon different bases. When a jury fixes the

[1] *Supra* note 1.

sentence for a crime it must do so upon the basis of the information before it. That information consists of the evidence presented during the trial and so is limited to data which is relevant and material to the alleged crime. Hence, when a jury is required to pass upon the death penalty, it must do so upon the basis of evidence concerning the crime itself. But, when a federal judge in modern times imposes sentence after a jury verdict, he has before him a presentence report, which contains the prior criminal record, if any, of the defendant and information about his characteristics, financial condition, and circumstances affecting his behaviour.[1] Thus in modern penology the element of rehabilitation looms large. The judge chooses the sentence to be imposed upon the basis of much material other than that relating to the crime itself. A jury, under present procedure, cannot make a choice upon that basis.

Forceful though we think the foregoing considerations to be, we think appellant's argument cannot be sustained. Unlike the situation in the ordinary case, the jury had a serious responsibility in respect to punishment for this crime. They had a right to know what the law is upon that punishment. Thus, clearly, they had a right to know that the punishment other than death is imprisonment for not more than thirty years. But the phrase in this statute—"for not more than thirty years"—is not the whole of the law upon the matter; standing alone it is not an accurate reflection of the law. A minimum sentence is required, and parole applies. The trial judge did no more than state accurately the whole law in respect to punishment for this crime. He did not attempt to forecast what might happen or to elaborate in any way. He did no more than state the law upon the point, and the point was one for the jury in this case. We think the jury was not remiss in seeking to know the alternative

[1] FED. R. CRIM. P. 32(c). See Williams v. New York, 337 U.S. 241, 246, 93 L.Ed. 1337, 69 S.Ct. 1079 (1949).

sentences as an aid to an intelligent decision upon the problem imposed upon them by the statute; *i.e.*, whether the death sentence was the proper imposition. We think the trial judge was not in error when in response to the request he gave the jury accurately the whole of the law respecting punishment for this offense.

Mallory's third point is that the admission into evidence of articles of clothing worn by him at the time of the alleged crime was error. He relies on *Nelson* v. *United States*[6] and *Judd* v. *United States*.[7]

Immediately after Mallory signed a confession officers questioned him about his clothing. He told them it was in the janitor's apartment, which adjoined the furnace room where the rape occurred. He gave written permission to go to the apartment and get the clothes and accompanied two officers on that errand. The shorts, coat, shirt and trousers bore seminal stains.

Mallory argues that his consent to the search was not clearly shown to have been without duress or coercion. We think it was, and, moreover, the consent was an immediate accompaniment to a confession of the crime and derives color from the confession.[8] In *Judd* and *Nelson* no confession was involved. Here, since Mallory had already confessed to the crime itself, in the absence of evidence to the contrary his express consent to the taking of specific property involved in the crime must be treated as being of the same voluntary nature. We find no error in this respect.

The judgment of the District Court will be

Affirmed.

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[6] 93 U.S. App. D.C. 14, 208 F.2d 505 (D.C.Cir. 1953), *cert. denied*, 346 U.S. 827, 98 L.Ed. 352, 74 S.Ct. 48 (1953).

[7] 89 U.S. App. D.C. 61, 190 F.2d 649 (D.C.Cir. 1951).

[8] *Cf.* United States v. Mitchell, 322 U.S. 65, 88 L.Ed. 1140, 64 S.Ct. 896 (1944).

BAZELON, *Circuit Judge*, dissenting: I cannot agree with the court's conclusions that (1) a proper answer was given to the jury's inquiry as to whether a sentence of imprisonment would assure appellant's confinement for the rest of his natural life; and (2) the admission in evidence of the confession was proper under the *McNabb* rule.

I.

It would appear, as the majority says, that it is generally proper for a trial judge to inform the jury of "the alternative sentences as an aid to an intelligent decision upon the problem imposed upon them by the statute." See *Taylor* v. *United States*, 95 U.S.App.D.C. 373, 379, 222 F.2d 398, 404 (1955). The judge must be ever wary, however, that the efficacy of the additional information be not far outweighed by palpable prejudice to the defendant.

This jury did not request information as to alternative sentences. It requested an *assurance* that if it did not impose the death sentence, the defendant would nevertheless receive a term long enough to make him die in prison; and that his sentence would not thereafter be modified by the judge, or commuted or pardoned by the executive or shortened by the parole authorities. "In the instant case, this is what the jury wanted to know, and its purpose in seeking information is too plain for argument." *Coward* v. *Commonwealth*, 164 Va. 639, 178 S.E. 797, 800 (1935). The information the judge supplied, in the light of the jury's purpose in requesting it, was grossly prejudicial to the appellant.

II.

Appellant was arrested at 2:30 p.m., but the police made no attempt to bring him before a committing officer until some time after 10:00 p.m., when they telephoned the home of the United States Commissioner and

found he was unavailable. Rule 5(a), F.R.CRIM.P., requires that an arrested person be taken before a committing officer "without unnecessary delay." As I pointed out in my dissenting opinion in *Green* v. *United States*,[1] whether a delay is "unnecessary" is determined by the circumstances of the case. Were this a case of unavoidable delay, as in *Green*, I would say, as I did there, that the police might have attempted to legitimatize the confession by giving the prisoner, in advance of interrogation, the advisory statement which the commissioner would give him under Rule 5(b). But no advisory statement was made here; and, even if it had been, it could not, in the circumstances of this case, have saved the confession from exclusion under *McNabb*.

The delay in taking appellant before a committing officer was the deliberate choice of the police and not the result of unavoidable circumstances. The arrest occurred during regular business hours and in taking appellant to police headquarters immediately thereafter police passed within earshot of many of the approximately 50 officers, authorized by law to commit accused persons. Clearly the delay was "unnecessary" in the usual sense of the word. In *Akowskey* v. *United States*, 81 U.S.App. D.C. 353, 158 F.2d 649 (1946), the arrest was made between 3:30 and 4:00 p.m. and "no effort was made by the arresting officers to take the men before a committing magistrate until about 5:00 or 5:30 p.m. when an unanswered telephone call was made to the United States Commissioner's office." We said:

> The commissioner and several other committing magistrates before whom the accused might have been taken for a hearing had their offices on or near the axis connecting the place of arrest and the place of

[1] — U.S.App.D.C. —, —, — F.2d —, — (No. 12809, decided this day).

[2] See 18 U.S.C. § 3041 (1952).

> detention. It is only reasonable to conclude that the parties could have been transported to the office of one of these officials in less time than it took to get to police headquarters. It is furthermore both by law and practice true that application for hearing might have been made to any of these committing magistrates at any hour. It follows that the detention was inexcusable and illegal at the outset. [81 U.S. App. D.C. at 354, 158 F.2d at 650]

In the present case the majority hold the delay "not unreasonable," because there were three suspects. They say "it is inconceivable that [the police] should be required to lodge charges against any suspect until their investigation has developed with some certainty a justification for charges."

The policy of discouraging the airing of reckless charges is commendable. But another and more commendable policy is that the police should not arrest any person on mere suspicion,[3] hoping that, once they have him at headquarters, they can obtain from his own lips something to justify the arrest.[4] To me the "inconceivable" thing is that this court should permit detention—for any length of time—for that purpose and without the intercession of a responsible committing officer.[5] The law lets

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[3] "Suspicion is one thing; reasonable cause for suspicion is frequently quite another thing." United Cigar Stores Co. v. Young, 36 App.D.C. 390, 404 (1911).

[4] ". . . the law demands that 'reasonable cause for prosecution of the defendant must exist before his arrest is justifiable.' *Davis* v. *United States*, 16 App.D.C. 454; *Kirk* v. *Garrett*, 84 Md. 405, 35 Atl. 1089." United Cigar Stores Co. v. Young, 36 App.D.C. 390, 403 (1911). See also Carroll v. United States, 267 U.S. 132, 156 (1925): "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony . . . ."

[5] In Watson v. United States, — U.S.App.D.C. —, —, — F.2d —, — (No. 12675, decided May 3, 1956), the court

policemen arrest, but delegates to magistrates the judgment whether to detain.[3] The law's requirement of arraignment without unnecessary delay is grounded upon the theory that, where policemen are judges, individual liberty and dignity cannot long survive.[4]

The police here preferred to arrest a number of suspects and grill all of them until one admits something which justifies his arraignment.[5] But the law de-

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held a written confession to have been improperly admitted in evidence. By way of dictum, it approved the admission of testimony as to somewhat earlier oral confessions. To the extent that this dictum gives a license to police to hold and question an arrested person all through the night, incommunicado, uncounseled and unwarned, for the purpose of obtaining from him the evidence to justify his detention at his eventual arraignment, I disagree with it.

[3] Rule 5, F.R.CRIM.P.; McNabb v. United States, 318 U.S. 332 (1943).

[4] "Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication." McNabb v. United States, 318 U.S. at 343.

[5] The Federal Bureau of Investigation, on the other hand, arrests no person without informing him that he need not answer questions, that any answers he gives may be used against him, and that he has a right to counsel. See Hoover, *Civil Liberties and Law Enforcement*, 37 IOWA L.R. 175, 182 (1952).

[6] The requirement of Rule 5 that the police bring prisoners up for arraignment, even before they have what they

nies them that privilege." Detention of prisoners without arraignment "for the very purpose of securing . . . confessions . . . refutes any possibility of an argument" that subsequent arraignment was "without unnecessary delay." *Upshaw* v. *United States*, 335 U.S. 410, 414 (1948). However "this method of arresting, holding, and questioning people on mere suspicion" may be "in accordance with the 'usual police procedure of questioning a suspect . . .'" it is in violation of law, and confessions thus obtained

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think is sufficient evidence to satisfy the committing officer that there is "probable cause to believe" the prisoner's guilt, does not leave the police powerless to detect and apprehend criminals. The police may lawfully question witnesses and suspects. True they cannot make people answer their questions, but that they cannot lawfully do even when the suspect is under arrest. The only difference is that they will not have whatever advantage there may be in the automatic coercion of prison bars. If there is any prospect that a person whom the police wish to question may flee or hide (as happened, indeed, in the instant case), they may, upon proper showing, procure an order placing him under bail and, if he fails to give bail, detaining him. Rule 46(b), F.R.CRIM.P. In this connection, it is worth noting that witnesses thus detained under a magistrate's order must be lodged in suitable accommodations to be provided by the Board of Commissioners, "other than those employed for the confinement of persons charged with crime, fraud or disorderly conduct." D. C. CODE § 4-144 (1951).

[10] Another area of criminal procedure in which ease must yield to propriety was referred to in Powell v. United States, 96 U.S.App.D.C. 367, 372, 226 F.2d 269, 274 (1955): "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

are inadmissible under the *McNabb* rule." *Ibid.*[11]

Even if it be assumed[12] that solicitude for the prisoner may sometimes legally justify some postponement of his arraignment, this was not such a case. The postponement here sprang from police solicitude for their prospects of obtaining a confession. They held and questioned three prisoners until one confessed. Then they arraigned the latter and released the other two. This is not unlike the *Akouskey* case where the police arrested, detained and questioned three men who were under the shadow of suspicion, obtained a confession implicating two of them, and then arraigned those two and released the third. And the detention here was just as "inexcusable and illegal."[13]

As an additional ground for its holding, the majority relies upon an alleged requirement of the *McNabb* rule of a showing that "the confession was due to the delay." The reliance is apparently upon the dictum of this court

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[11] In striking down the written confession in *Watson, supra* note 5, the court reveals the motivation which lies behind such "usual police procedure": "The police undoubtedly knew that once the appellant was presented to a committing authority, they were obliged to file a complaint. But then appellant would have received the benefit of Rule 5(b), and the police were not yet through with him. The attitude, the purpose, could not better be shown than by the Government's argument to the jury. The prosecutor said: 'They say why didn't we put him downstairs [in the cell block] and call him back the next morning. Why? We would find the place crawling with attorneys telling him "You don't have to talk to the police." '" (Slip opinion, p. 9). See also 1 ALEXANDER, THE LAW OF ARRESTS (1949) 628. The oral confessions which were approved *obiter dictum* in *Watson* obviously resulted from the same deprivation of rights which produced the condemned written confession.

[12] See Watson v. United States, *supra* note 5, slip opinion, p. 6.

[13] 81 U.S.App.D.C. 353, 354, 158 F.2d 649, 650 (1946).

in *Watson v. United States*,[14] which was, in turn, based upon dicta in *Allen v. United States*[15] and *Pierce v. United States*.[16] Since the views expressed in all three of those cases were dicta, we are, of course, not bound to follow them in deciding this case. Moreover, our greater deference for the views of the Supreme Court than for our own should prevent us from following these dicta.[17] I cannot agree that a confession produced by police interrogation during illegal detention of the accused can be admissible in a federal court.

After obtaining the written confession from appellant, the police also obtained from him a written consent to a search of the apartment where his clothes were. Certain clothes thus found were admitted in evidence. I agree with the majority's statement that the consent to the search was "an immediate accompaniment to . . . and derives color from the confession." On that account I would hold the one to have been as inadmissible as the other.

For the foregoing reasons, I would reverse the judgment of conviction and remand the case for a new trial.

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[14] *Supra*, note 5.

[15] 91 U.S.App.D.C. 197, 202, 202 F.2d 329, 334, *cert. denied*, 344 U.S. 869 (1952).

[16] 91 U.S.App.D.C. 19, 197 F.2d 189, *cert. denied*, 344 U.S. 816 (1952).

[17] Upshaw v. United States, 335 U.S. 410, 413 (1948); see Brown v. Allen, 344 U.S. 443, 476 (1953); and Stein v. New York, 346 U.S. 156, 187-88 (1953).

Before: Prettyman, Bazelon and Bastian, Circuit Judges.

Judgment

(June 28, 1956)

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of said District Court appealed from in this cause be, and the same is hereby, affirmed.

Dated: June 28, 1956.

Per Circuit Judge Prettyman:

Separate dissenting opinion by Circuit Judge Bazelon.

* * * * *

517 [Clerk's Certificate to foregoing transcript omitted in printing.]

518 Supreme Court of the United States

No. 173 Misc. ——, October, 1956

[Title omitted.]

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia Circuit.

Order allowing certiorari

(October 22, 1956)

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 521.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

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WILLIAM C. GARDNER,
Counsel for Petitioner.

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 98 US App DC 406; and 236 F 2d 701.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered June 28, 1956. (R. 118).

The jurisdiction of this Court is invoked under Section 1254 Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

Questions Presented

1. Whether a confession obtained from petitioner, a mentally retarded youth of 19 years of age, as a result of detention without benefit of counsel for approximately seven hours, during which time petitioner was subjected to prolonged questioning and to a "lie detector" test by federal officers for the very purpose of securing such confession during all of which time petitioner could have been taken before a readily accessible committing authority, is admissible in a criminal proceeding in a federal court?

2. Whether a written statement by this petitioner to police officers purporting to authorize them to search his home, obtained by them from petitioner at substantially the same time they obtained his confession constituted the voluntary consent necessary to make valid their subsequent search of his home without a warrant and render admissible against him in a criminal proceeding in a federal court incriminating evidence belonging to him seized by them during the search?

3. Where a jury, deliberating upon a charge of rape under a statute which expressly provides only for imprisonment for not more than thirty years of such offense provided that the jury may prescribe the death penalty if they should reach a verdict of guilty, came into the courtroom and asked the trial judge if they could be assured that the defendant would be imprisoned for life with no possibility of release, and the trial judge, in response, instructed the jury that he could give no such assurance; that even if he imposed the maximum sentence of thirty years he would have to also impose a minimum sentence of not more than ten years; and that at the expiration of the ten years the Parole Board would have to decide whether the defendant should be imprisoned beyond the ten-year minimum; and

the jury thereupon retired and after further deliberation of twenty minutes returned a verdict of "Guilty with the death penalty", was that instruction such interference with the function of the jury and such prejudicial error as to require a new trial?

Rules and Statutes Involved

Rule 5(a)(b) Federal Rules of Criminal Procedure:

(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

Rule 41(e) Federal Rules of Criminal Procedure:

Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant. . . . If the motion is granted the

property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. . . .

Title 22, District of Columbia Code, Section 2801.

Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: Provided, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: Provided further, That further That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

Fourth Amendment of the Constitution of the United States.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment of the Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Statement of the Case

The petitioner, Andrew R. Mallory, was charged on May 3, 1954, in a single count indictment with the crime of rape upon one Stella R. O'Keane (R 1), an offense against the United States under the Code of laws of the District of Columbia. On May 14, 1954, after appointment of counsel, petitioner was arraigned, at which time the plea of Not Guilty was entered. However, because of numerous examinations by the Court appointed psychiatrists for the purpose of determining petitioner's mental competency to proceed with his trial, actual trial was commenced over a year later on June 21, 1955, before the Honorable Judge Holtzoff of the United States District Court for the District of Columbia, after a lunacy inquisition conducted immediately prior to the trial on the same day. (R. 9-16).

The protracted period resulted from conflicting determination by the Court-appointed psychiatrists as to the petitioner's mental competency, and re-examination designed to resolve them (R 2-7).

A verdict of Guilty was returned on June 24, 1955, at 5:15 o'clock, to which verdict the jury added the words, "with the death penalty." (R 108)

The evidence and proceedings are substantially as follows:

Stella O'Keane, complainant, stated that on Wednesday, April 7, 1954, at about ten minutes to six p. m. she went into the basement quarters of the apartment house at 1223 12th Street, Northwest, in which she occupied an apartment on the second floor. According to the complainant, she went to the basement for the purpose of washing some clothes in the washing machine in the laundry room; and when she experienced difficulty in detaching one hose from a water faucet and attaching another hose to the same faucet, she

knocked on the door to the janitor's quarters seeking help. Mrs. O'Keane identified the petitioner as the person who responded to her request, and stated that after he took the hose off he went back into the apartment. A few minutes later, while taking some clothes off of a clothes-line in another portion of the basement, according to Mrs. O'Keane, she happened to glance around, at which time she saw a man approaching her wearing a hat and a handkerchief over his face. The complainant stated that when she screamed the individual ran over to her, told her to be quiet and dragged her into the furnace room where he put her on the floor and had sexual relations with her. The only thing that the complainant could remember about the individual who molested her was that he had a handkerchief tied over his face, that his eyes were very bright, and that he wore a high slouch hat. Mrs. O'Keane was unable to identify the petitioner as the individual who assaulted her, stating only that her attacker was tall like the petitioner.

The petitioner, Andrew R. Mallory, lived in the janitor's quarters with his half-brother and his family, including Milton Mallory and Luther R. Mallory, Jr., who were sons of petitioner's half-brother. In the course of their investigation of the assault on Mrs. O'Keane, the police took into custody both Milton and Luther R. Mallory, Jr., and also the petitioner. Officer Yuter arrested the petitioner on Thursday, April 8, 1954, between two and two-thirty p.m., at 1258 Owens Place, Northeast (R. 21). Petitioner was taken directly to Police Headquarters at 3d and Indiana Avenue, Northwest, arriving there at about three o'clock in the afternoon (R. 21). Because the Sex Squad Office was crowded at the time, petitioner was immediately taken to the Police Identification Room on the third floor, at which time interrogation was commenced by Yuter in the presence of Officers Mackie, Tate and Elliott. Petitioner denied that he had done anything in connection with this

crime (R. 22). Officer Yuter stated that Sergeant Elliott also asked petitioner questions in connection with the offense before he (Officer Yuter) was called out of the Identification Room to the Sex Squad Room (R. 22, 24).

Officer Elliott stated that he first saw petitioner around three forty-five on the afternoon of April 8, in the Identification Room, and that at the time in addition to Officer Yuter, Lieutenant Sullivan, the Officer in Charge of the Sex Squad, was also present. Elliott stated that he questioned Andrew Mallory about the attack on Mrs. O'Keane, and that petitioner denied any wrong-doing (R. 25-26). Officer Yuter stated that after he left petitioner shortly after three p.m. the next time he saw Mallory was at about ten forty-five p.m. in the Sex Squad Office on the same date of April 8, 1954 (R. 23). Officer Elliott also testified that after he left Mallory around four o'clock p.m. he next saw him some time between ten and eleven p.m., on the same date in the Office of the Sex Squad, at which time "practically every man in the Sex Squad was present at the time"; and that Officers Mackie and Tate and also Lieutenant Sullivan were talking to the petitioner (R. 26). Elliott stated that it was at this time that petitioner said that he was the person who had attacked Mrs. O'Keane.

Officer Mackie testified that he first saw petitioner in the Identification Bureau at about three p.m., on the afternoon of April 8th in the presence of Lieutenant Sullivan, Officers Elliott and Tate, and also Sergeants Ashley and Weaver (R. 29). According to Mackie, Sergeant Weaver also questioned the petitioner at the time (R 29). Also, Mackie stated that he saw the petitioner on the afternoon of April 8th from about three to four p.m., and later on that night from seven o'clock to some time after eleven p.m.; and that during that time, he and other officers in his presence questioned Mallory relative to the offense (R. 29-32).

Officer James K. McCarty, a member of the General As-

signment Squad of the Detective Bureau stated that he was called to Police Headquarters some time on the evening of April 8th and that shortly after eight p. m. he began interrogating Andrew Mallory about the alleged rape, at which time Mallory stated that he had not committed any crime and that he would take a lie detector test. McCarthy was with petitioner for a total period of about one and one-half hours, the two of them alone in a small room in which McCarty conducted a lie-detector examination (R. 73). Although denying implication in the crime for the great part of the time, according to McCarty, "shortly before the expiration of this one and one-half hours, Andrew first stated that he could've done this crime or that he might have done it. He finally stated that he was responsible and went into some detail as to what actually did occur."

Immediately after petitioner made the damaging admissions, McCarty called Officers Mackie and Tate from the Sex Squad. In his testimony McCarty described the small room in which he examined and interrogated the petitioner with the door closed; and gave a detailed description of the machinery with its various dials and controls, comparing it generally with a dash board on a car or the control panel on an airplane (R. 72-76). During the actual examination there was a hose connection from the instrument panel to the petitioner's chest for the purpose of recording his breathing. Another connection was established between the machine and petitioner by a hose leading to a wrist cuff that fastened around one wrist of the petitioner. This was for the purpose of checking his blood pressure. In addition, a connection was set up between the machine and the fingers on petitioner's other hand by a wire attached to petitioner's fingers with some tape. McCarty stated that, based on the thorough briefing which he had received from the other officers, he proceeded to interrogate peti-

tioner while he was connected to the machine. For a very brief period after the machine was disconnected, according to McCarty, Mallory continued to deny implication; but then after he was "approached with sympathy" petitioner finally stated that he might or could have done it, and then launched into the confession. It was after this confession that Officer Mackie was called from the Sex Squad at about nine forty-five p.m., to the lie-detector room, at which time, according to Mackie, Mallory made a verbal confession to them. After that, at 11:07 p.m. petitioner was alleged to have made the same verbal statement in the presence of the complainant and other Sex Squad Officers. Close on the heels of the verbal statement, the written statement was made.

Immediately after the verbal admissions were made to Mr. Mackie at about ten o'clock p.m., some officers of the Sex Squad tried to get in touch with the United States Commissioner on the night of April 8, 1954, for the purpose of arraigning petitioner. Apparently the Commissioner was unavailable, and the petitioner was arraigned some time in the morning on April 9, 1954 (R. 64).

Officer Mackie stated that about the same time the written statement was taken, petitioner gave the police a "written statement giving us permission to go to the apartment" for the purpose of searching for the clothes that were worn by the petitioner at the time of the alleged attack (R. 34-39). Both the confession and the written "consent" were admitted over objection of petitioner, as were the items of clothing secured pursuant to the alleged "consent", with incriminating stains and substances on them.

Testimony was presented on behalf of the petitioner by Dr. Joseph W. Rome who was one of the psychiatrists appointed by the District Court to examine the petitioner after he was chosen for that purpose by the United States

Attorney's Office. Dr. Rom stated that he found the petitioner to be a dull, retarded young man, nineteen years old, with mental symptoms which led him to conclude that he was of unsound mind on July 7, 1954, (the time of his examination); and that in his opinion petitioner was suffering from the same mental illness at the time the alleged offense was committed. The only evidence offered by the United States Government bearing on mental condition was in the form of opinions expressed by Police Officers to the effect that at the time statements were taken from the petitioner he appeared to be of sound mind. Dr. Rosenberg, Deputy Coroner for the District of Columbia, who had given Mallory a pysical examination on the evening of April 8th, gave testimony to the same effect. The petitioner testified in his own behalf, at which time he denied committing any crime and stated that he had no recollection of ever admitting any such thing.

Evidence was concluded in the case on the evening of June 23, 1955, after the closing arguments, the Court charged the jury. In the course of commenting on the evidence, the Court stated that "Mrs. O'Keane identified on the witness stand the defendant as the person who raped her . . . " (R. 101).

At eleven fifty-three o'clock a.m., on June 24, 1955, the jury retired for its deliberations. At four fifty p.m., the jury was returned to the courtroom pursuant to a request or additional instructions. The jury foreman had sent a note to the Court couched in the following language: "have we other choice of verdicts than these four, (1) Guilty with death penalty, (2) Guilty as charged, (3) Not guilty by reason of insanity, (4) Not guilty. On #2 above: can we the jury be *assured* that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release—May the jury have a reading of the D. C. Code re: Rape?" (R. 106).

The Court informed counsel at the bench that as to question #2 he would answer "I cannot give them any such assurance". After informing the jury that the verdicts listed were the only possible ones in the case, Judge Holtzoff went on to instruct the jury relative to the inquiry having to do with punishment in the following language: "I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is thirty years, but even if the Court imposes the maximum, and, of course, I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term that the Court can impose would be an indeterminate sentence of ten to thirty years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum. So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged". (R. 106-107).

The Section from the D. C. Code re rape was given in the following language: "Whoever has carnal knowledge of a female forcibly and against her will shall be imprisoned for not more than thirty years provided that in any case of rape the jury may add to their verdict if it be guilty the words "With the death penalty," in which case the punishment shall be death by electrocution. Provided, further, that the jury fails to agree as to the punishment, the verdict shall be received, and the punishment shall be imprisonment as provided in this section." (R. 107).

The foreman indicated that all questions had been answered clearly and at four fifty-five p.m., the jury returned to the jury room for further deliberation and at five fifteen o'clock p.m., they returned to the jury box with a verdict of guilty with the death penalty.

On Tuesday, June 28, 1955, after a motion for a new trial was filed, argued and denied, petitioner was sentenced to die by electrocution (R. 110).

It is from this verdict and this judgment that petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. On June 28, 1956, the judgment was affirmed by a divided Court, Judge Bazelon dissenting.

A petition for a writ of certiorari was filed in this Court on July 28, 1956. Certiorari was granted on October 22, 1956.

Specifications of Error to Be Urged

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding admissible a confession extracted from the petitioner, a mentally retarded youth of nineteen years of age, at the end of a seven and a half hour period of detention without counsel, during which period he was subjected to intermittent questioning and a "lie detector" test by Federal officers in the face of repeated denials of guilt, despite the fact that he was arrested during the regular business hours of the day and interrogated within a stone's throw of between 35 or 40 officers qualified to act as committing magistrates.

2. In holding that the search for, and seizure of, certain critical items of clothing was pursuant to the type of voluntary consent required for such search and seizure in the absence of a warrant.

3. In labelling as proper the trial court's supplemental instruction to the jurors in answer to questions relative to the certainty of petitioner's life-time imprisonment, in which instruction the court, in addition to pointing out a lack of assurance of such penalty set out the penalty for the crime in both its maximum and minimum terms and,

in addition, pointed out the prerogative of the Parole Board to release the defendant at the end of the minimum period, if it so desired.

Summary of Argument

I

An alleged confession obtained from a defendant who is a nineteen-year-old near moron, at the end of a period of seven or eight hours of detention without the benefit of counsel, and during which time he is subjected to repeated questioning in the face of repeated denials of complicity, and is finally subjected to a lie detector test and more questioning by Federal officers for the very purpose of securing an incriminating statement, and during which time the accused could have been taken before a readily accessible committing authority, is inadmissible in a criminal proceeding in a Federal court.

II

A written statement by the petitioner purporting to be his consent to the search of his home by police officers and given under the same conditions and circumstances as those described above and contemporaneously with the alleged confession fails to meet the standards of "voluntary consent" necessary to make valid the search without a warrant and thus rendered the fruits of such search inadmissible against him in the criminal proceeding in the Federal Court.

III

In prosecution for rape, where the jury had nothing to do with punishment of defendant except to the extent that under the statute they might impose the death penalty when, after deliberating for several hours the jury asked whether they could be assured that defendant would serve the balance of his life in prison if they did not impose the death penalty,

the Court committed prejudicial error when it stated that it could give no such assurance; that the maximum penalty under the statute was thirty years, but that when the Court imposed the maximum it also was bound to impose a minimum not to exceed ⅓ of the maximum; and that even then, after service of the minimum, the Parole Board would determine whether the defendant should serve anything over the minimum sentence.

Assuming, *arguendo*, that there was any obligation on the Court to answer the inquiry, there was no reason to mention the punishment; and further assuming, *arguendo*, that the punishment should have been mentioned, the Court should have confined its remarks to the language of the statute governing the crime. The function of the Parole Board and the range of possibilities inherent in their function had no relevance to the jury's determination except to emphasize the speculative possibility of early release and assure the petitioner of the death penalty under the circumstances surrounding the jury's inquiry.

ARGUMENT

I. The Confessions Were Erroneously Admitted Into Evidence

Evidence of both the oral and written confessions of the petitioner should have been excluded under the terms of the principle enunciated by this Court in *McNabb* v. *U. S.*, 318 U. S. 332 (1943) 6 S. Ct. 608, 81 L. Ed. 819, and popularly known as the McNabb rule.

Petitioner's alleged confession followed a seven and a half or eight hour period of detention, beginning about 2:30 P. M. and ending some time around 10 o'clock P. M. Only after the confession had been obtained (between 9:30 and 10 o'clock P. M.) did the police make the first attempt to con-

tact a committing magistrate for the purpose of arraigning petitioner.

It seems altogether clear that the failure to present petitioner before a committing magistrate at an earlier time was due to the deliberate disregard of Rule 5 F. R. Cr. P., on the part of the police in order that they might have time and opportunity to examine petitioner while he was still ignorant of the information which paragraph (b) of Rule 5 commands that he shall have; and in order that they might avoid the risk of having petitioner discharged by a committing officer for lack of probable cause—a very considerable risk in light of the paucity of evidence in their possession up to the time of confession. No other explanation for a failure to sooner present petitioner to one of the many committing officers who were within earshot of the place of detention can reasonably be inferred (R. 117). It would be frivolous to suggest that this delay was necessary because a committing officer was unavailable or inaccessible or that the police lacked the means of bringing petitioner before such officer. Indeed, nothing *compelled* delay; the police *chose* delay to gain time for interrogation and investigation.

The course which the police chose may be in accordance with the most efficient methods of crime detection; however, it runs head on against the procedure which Congress has prescribed. It needs must yield. Federal courts in such cases recognize the supremacy of the legislative will and, since 1943, have held inadmissible confessions obtained during periods of unnecessary delay, even if not procured by threats, coercion or promises, because procured "through such a flagrant disregard of the procedure which Congress has commanded . . ." *McNabb* v. *United States*, 318 U. S. 322 at 345. This principle of evidence suppression, popularly known as the *McNabb* doctrine, has since been reaffirmed by this court in *Upshaw* v. *United States*, 335 U. S.

410 (1948); *Brown* v. *Allen*, 344 U. S. 443, 476 (1953); and *Stein* v. *New York*, 346 U. S. 187-88 (1953).

The majority of the Court below has held that the *McNabb* rule is inapplicable here because (1) the delay was not "unreasonable", and (2) the evidence does not show that "the confession was due to the delay." (R. 112) The delay was reasonable, they say, because, since there were three suspects, time was required by the police to continue their investigation until they had developed evidence to support a charge against one of them, provided they didn't prolong the investigation "unduly". (R. 112) This is tantamount to the Court's holding that police, in the process of crime detection, may, while without evidence or knowledge of facts sufficient to justify a charge against any one of them, arrest three suspects and deliberately withhold all or some of them from presentment before an available and easily accessible committing officer, in accordance with Rule 5, until their investigation does develop facts sufficient to justify a charge, provided they don't investigate too long.

But the majority but begs the question. The question here is not whether the *investigation* was "unduly prolonged", but rather whether the *delay* was unnecessary and unreasonable. Rule 5 is not aimed at curtailing investigation, but at avoiding "all the evil implications of secret interrogation of persons accused of crime". *McNabb* v. *U. S.*, *supra*, at 344. It does so by affording them the safeguards contained therein.

We submit that the critical question, *i. e.*, whether delay in presentment solely for the purpose of facilitating investigation is unnecessary and unreasonable, was answered in *Upshaw* v. *United States*, *supra*, where this Court held inadmissible a confession under the *McNabb* rule on the ground that it had been obtained during a detention which was for the sole purpose of investigation, saying: "In this case

we are left in no doubt as to why this petitioner was not brought promptly before a committing magistrate, * * * because the officer thought there was not 'a sufficient case' for the court to hold him. * * * The argument was made to the trial court that this method of arresting, holding and questioning people on mere suspicion was in accordance with the 'usual police procedure of questioning a suspect . . .' However usual this practice, it is in violation of law, and confessions thus obtained are inadmissible under the McNabb rule." 335 U. S. at 414. The court below, itself, has heretofore, in like manner, vitiated a confession obtained under circumstances, in every essential respect, identical to those present here. *Akowskey* v. *U. S.*, 81 U. S. App. D. C. 353, 158 F. 2d 649 (1946).

We submit that "unnecessary delay" does not depend upon the time desired to keep a suspect away from the committing magistrate for the purpose of interrogation and investigation and making a case against him, as the Court below would have it, but rather upon the time required to bring the suspect before the committing magistrate. *See U. S.* v. *Leviton*, 193 F. 2d 848, 860 (1951) (dissenting opinion). The lower Court's interpretation seems to be squarely in conflict with the decisions of this Court and the general legislative policy underlying Rule 5.

It is suggested that Judge Bazelon adopted the correct yardstick for measuring *necessary* or *unnecessary* delay when he said:

> "'. . . the issue of whether there has been an 'unnecessary delay' in arraignment must be resolved, in every case, by deciding whether there have been reasonable and bona fide efforts promptly to seek a commissioner or other nearby officer." *Rettig* v. *United States of America*, U. S. App. D. C. Oct. 1956 No. 12697.

For its second reason for holding that the *McNabb* rule was inapplicable, the Court below held that there was no evidence that the confession "was due to the delay, such as it was" (R. 112). While the meaning of this cryptic statement is rather obscure, it seems to suggest that the lower Court is stubbornly clinging to its old "fruit of the illegal detention" concept which it attempted to read into the *McNabb* rule in *Upshaw* v. *U. S.*, 83 App. D. C. 207, 209, 168 F. 2d 167, 169 (1948). But this Court rejected this misinterpretation of the *McNabb* rule and pointed out that "[t]he *McNabb* confessions were thus held inadmissible because the McNabbs were questioned while held in 'plain disregard of the duty enjoined by Congress upon Federal law officers' promptly to take them before a judicial officer." *Upshaw* v. *U. S.* 335 U. S. 410, 413. We submit that under the *McNabb* and *Upshaw* decisions a confession obtained at the end of a period of detention during which the petitioner is withheld from presentment solely for the purpose of obtaining such confession is illegal, without resort to any independent exposition of the casual relationship between the detention and the confession which the lower court's obscure "due to" test would seem to call for.

Finally, it is suggested that even the standard adopted by dissenting members of this Court in *Upshaw, supra,* outlaws the confession obtained under the circumstances of this case. 335 U. S. 429, 93 L. Ed. 111.

II. The Alleged Consent to Search Was Invalid and the Consequent Seizure Illegal

This Court and inferior Federal Courts have held that "consents" to search homes without warrants must be proved by clear and positive testimony and that the prosecutor must establish that there was no duress or coercion, actual or implied; and that the Government must show that

the consent is freely and intelligently given.[1] In *Judd* the Court stated that the burden on the Government is particularly heavy in establishing the validity of such consent where the individual is under arrest. In both *Judd* and *Nelson, supra*, it was stated that the circumstances of an arrested defendant's plight might be such as to make any claim of consent "not in accordance with human experience".

Applying the doctrine enunciated in the cited cases, whether or not valid consent was given by Mallory to the search and seizure must be determined by appraisal of the entire set of circumstances; and essential to that appraisal is an examination of the influences at work on Mallory, and also an evaluation of the petitioner himself. To contend that the nineteen year old, poorly educated, dull and retarded petitioner, who had been held in custody for seven or eight hours without any attempt to arraign him, and who had been questioned intermittently and persistently during his period of illegal detention by varying groups of police officers, gave to those police officers a voluntary, free and intelligently made "consent" to do anything is to swim upstream against both logic and well-established principles of law as enunciated by this Court. It is urged upon this Court that appraisal of the entire set of circumstances, along with examination of the influences at work on Mallory, together with evaluation of Mallory himself, reveal a situation much more flagrant than that which existed in either *Judd* or *Nelson;* and that, as a matter of law, the evidence was inadmissible.

It is respectfully submitted that the Government failed in its burden of establishing the legality of the "consent",

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[1] *Amos* v. *U. S.*, 255 U. S. 312, 65 L. Ed. 654; *Judd* v. *U. S.*, 89 U.S. App. D. C. 64, 190 F. 2d 649; *Nelson* v. *U. S.*, 93 U. S. App. D. C. 14, 208 F. 2d 505.

that the admission into evidence of the incriminating articles of clothing, which were said to have seminal stains and other evidences of intercourse, was error which prejudiced the petitioner's right to a fair trial.

A consent to search, otherwise involuntary, cannot be regarded as adequate simply because obtained almost simultaneously with a confession, which itself is the product of illegal detention and psychological pressure.

But, apart from the Fourth Amendment consideration, petitioner submits that this Court, in the exercise of its supervisory powers, should exclude evidence obtained during a search based solely on an alleged consent obtained during an illegal detention, which detention is had for the very purpose of getting evidence. The fruits of such a search should be condemned because ". . . secured through such a flagrant disregard of the procedure which Congress has commanded . . ." *McNabb, supra.*

Simply put, it seems that logic dictates that the prosecution be denied any benefit from any evidence obtained from a defendant during a period of 'unnecessary delay' between arrest and arraignment.

Judge Bazelon expressed this view when he stated in his dissenting opinion, "I agree with the majority statement that the consent to the search was 'an immediate accompaniment to . . . and derives color from the confession.' On that account I would hold the one to have been as inadmissible as the other."

III. The Supplemental Instruction Regarding Possible Penalties Constituted Reversible Error

This case was prosecuted under 22 D. C. Code 2801. While that section empowers the jury to exact the death penalty, it does not empower it to "fix punishment" if the death penalty is not imposed. Accordingly, when the jury

sent its note to the trial court requesting information as to whether, in the absence of the death penalty, petitioner would be given a sentence which would assure them that he would die in jail, they were concerning themselves with matters that were totally irrelevant to their function. It would appear, therefore, that the proper course for the Court to have pursued would have been to refuse to answer and to admonish the jury that they were not to consider any of the matters inquired about. Such procedure was followed by courts in the following cases: *Sukle* v. *People*, (1941) 107 Colo. 269, 111 P. 2d 233; *Thompson* v. *State*, (1948) 203 Ga. 416, 47 S. E. 2d 54; *Strickland* v. *State*, (1952) 209 Ga. 65, 70 S. E. 2d 710; *Houston* v. *Commonwealth*, (1937) 270 Ky. 125, 109 S. W. 2d 45; *Williams* v. *State*, (1950) 191 Tenn. 456, 234 S. W. 2d 993; *Jones* v. *Commonwealth*, (1952) 194 Va. 273, 72 S. E. 2d 693, 35 A. L. R. 2d 761.

If, however, the Court felt compelled to depart from the above-mentioned rule, and to make some answer, that answer should have been confined to a simple "No" without further mention of punishment, but with the admonition that the information they sought was not proper for them to consider and that they should not speculate upon what might happen after their verdict. In this case, however, the trial court not only failed to limit itself in the manner suggested, but proceeded to give the jury a lecture on the range of punishment, the Indeterminate Sentence Act, and the authority of the Parole Board, thus inviting the jury to speculate upon possibilities with which they should not rightfully be concerned. Indeed, instead of cautioning the jury that these things were matters not to be considered by them, the Court appeared to emphasize the likelihood of early release for the petitioner, to the point of persuading them to impose the death penalty. Moreover, in light of

the circumstances surrounding the inquiry, the inevitable effect of the trial court's remarks was evident, and amounted to what the court, in *Thompson* v. *State*, *supra*, characterized as a "hanging charge".

Judge Bazelon (dissenting), in citing this development as reversible error, captures the total atmosphere of prejudice when he says:

> ". . . The judge must be ever wary, however, that the efficacy of the additional information be not far outweighed by palpable prejudice to the defendant.
>
> "This jury did not request information as to alternative sentences. It requested an *assurance* that if it did not impose the death sentence, the defendant would nevertheless receive a term long enough to make him die in prison; and that his sentence would not thereafter be modified by the judge, or commuted or pardoned by the executive or shortened by the parole authorities. 'In the instant case, this is what the jury wanted to know, and its purpose in seeking information is too plain for argument.' *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797, 800 (1935). The information the judge supplied, in the light of the jury's purpose in requesting it, was grossly prejudicial to the appellant."

The only Federal case bearing specifically on this point is that of *Lovely* v. *United States*, 169 F. 2d 386. It is true that in the *Lovely* case there is no indication that the instruction relative to punishment if the death penalty were not imposed was given in answer to an inquiry. However, Judge Parker's language in discussing this point, at 169 F. 2d 391, seems to leave little room for any distinction to be drawn on the basis of gratuitious or requested information on this point. The Court stated "The jury had nothing to do with the punishment of the defendant, except that under

the statute they might decide whether or not he should be given capital punishment. . . . What they were to decide was whether the defendant was guilty or not and, if so, whether he should be given capital punishment. Whether he should be paroled after fifteen years, if not given capital punishment, was a matter which they could not decide and which should not have been called to their attention, even though they were told at the same time that they had nothing to do with it." Citing *Ryan* v. *U. S.*, 8th Circuit, 99 F. 2d 864; *Coward* v. *Commonwealth*, 165 Va. 639, 178 S. E. 797.

This language we think is dispositive of the issue.

A more recent case, *Jones* v. *Commonwealth*, 194 Va. 273, 72 S. E. 2d 693, 35 A. L. R. 2d 761, was decided in October 1952. This case is directly in point and cites the *Lovely* case as authority. As to whether or not any different rule should apply, depending upon whether the information is given gratuitously to the jury by the Court, or solicited from the Court by the jury, the Court states as follows:

> ". . . In State v. Carroll, 52 Wyo. 29, 69 p. 2d 542, a number of cases are reviewed and the court concludes that by the weight of authority reference to clemency which might be extended after verdict is ordinarily held not to be so prejudicial as to require reversal. In its opinion the court said it was not inclined to go as far as some of the cases had gone; that a voluntary statement by the court might have a tendency to influence the jury in their verdict, and hence should not be made; but it did not see how any good purpose would be served by refusing to answer on inquiry by the jury. It decided in that case that the jury had not been misled but said that in the future, upon inquiry made and answered fairly without suggestion as to what penalty should be imposed, the trial judges should tell the jury

that they should not speculate upon what might happen after the verdict.

"It seems to us that if it is thought necessary to tell the jury not to speculate about the information given, it is safer not to give the information at all, but rather to follow the rule of the *Coward* case and tell the jury that the information they ask is about something not proper for them to consider. The danger lies in the use made of the information and whether it is given voluntarily or involuntarily is not likely to control its use. . . ."

The underlying reason for withholding from juries the type of information given in this case is that in attempting to compensate for future clemency or what it might consider inadequate alternative punishment, the jury may impose a harsher sentence than would ordinarily follow from the crime. Such a practice would permit punishment to be based on highly speculative elements rather than on the relevant facts of the case, and necessarily would lead to unjust verdicts.

Under our system it would be most undesirable to have a jury's power to impose the death penalty exercised *negatively* as an expression of its disapproval of the scheme of punishment which the Congress has seen fit to establish, and thus thwart the legislative will. The importance of guarding against this is probably most aptly expressed by the Court in *Jones* v. *Commonwealth*, *supra*, thusly:

"It was the duty of the jury to fix the punishment according to the evidence and within the limits prescribed by law. It is clear that they were considering life imprisonment or a long term of years as proper punishment. It cannot be known whether they would have finally decided on such punishment, or to what

extent they were influenced to a verdict of death by a consideration of what we said in the Coward case if was not proper for them to consider; i.e., that a sentence of imprisonment might be set aside or cut down by some other arm of the State, acting under authority of a law of no less dignity than that which should govern the jury and possibly with a wisdom from the future not then available to the jury.

"The General Assembly of the Commonwealth, in addition to providing for pardon and for credit on prison sentences to encourage good behavior, has established a system of probation and parole looking to the rehabilitation of persons convicted of crime. The program has been in the main wisely administered and good results have been accomplished. There have been, of course, errors in judgment in individual cases. Such an instance may be in the mind of one or more members of a particular jury. But that jury, or any other, should not fix a defendant's punishment with the view of preventing the operation of laws that have been duly enacted for the handling of a prisoner after sentence in a way considered by the lawmakers to be in the best interests of the public and of the prisoner. To fix a defendant's punishment on that basis, quoting the Coward case [164 Va. 639, 178 SE 798] again, 'would be indefensible.'"

Conclusion

The action of the trial court in admitting the confession, and the evidence procured pursuant to the alleged 'consent to search', was violative of the standards formulated and prescribed by this Court for the conduct of criminal cases in the Federal courts.

The trial judge's supplemental instruction, the most damaging part of which was volunteered, exceeded the bounds

of judicial propriety and constituted indefensible interference with the jury function.

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals for the District of Columbia Circuit affirming such error should be reversed.

Respectfully submitted,

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(3932-1)

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 521

ANDREW R. MALLORY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court below (R. 111–118) are reported at 236 F. 2d 701.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1956 (R. 119). The petition for a writ of certiorari was filed on July 28, 1956, and was granted on October 22, 1956 (R. 119). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner's confession of rape, orally made after 6½ hours' detention (during which three

suspects were being investigated, and during which petitioner, one of the three suspects, was initially questioned less than 45 minutes and later questioned 90 minutes in the course of a polygraph examination) and reduced to writing soon thereafter, was inadmissible in evidence under the *McNabb* rule.

2. Whether petitioner's express consent to search, given to officers immediately following a voluntary confession, was invalid.

3. Whether the trial judge committed reversible error in explaining to an inquiring jury why he could give it no assurance that petitioner would legally be imprisoned for the rest of his life.

RULES AND STATUTES INVOLVED

Rule 5 (a) of the Federal Rules of Criminal Procedure provides:

> (a) *Appearance Before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

31 Stat. 1322 (1901), as amended, 22 D. C. Code § 2801 (1951), provides:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years

of age, shall be imprisoned for not more than thirty years: *Provided,* That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by electrocution: *Provided further,* That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

STATEMENT

A one-count indictment, returned May 3, 1954 in the United States District Court for the District of Columbia, charged petitioner with the crime of rape in violation of the District of Columbia Code § 22–2801 (1951) (*supra,* p. 2) (R. 1). On June 21, 1955, after being found competent to stand trial,[1] petitioner was tried by jury (R. 8, 16). The jury found petitioner guilty and added to its verdict a direction that the death penalty be imposed (R. 108). The Court of Appeals affirmed the conviction, Judge Bazelon dissenting (R. 111–118).

1. At trial, the following facts were adduced:

The complaining witness, a Mrs. Stella O'Keane, was raped by a masked assailant at about 6 p. m. on

[1] In July 1954, two psychiatrists had expressed the opinion that petitioner was incompetent to stand trial (R. 2, 4–5). Petitioner was committed by the court to St. Elizabeth's Hospital for observation on December 9, 1954 (R. 5). On February 24, 1955, the Acting Superintendent certified that, as a result of examinations by several qualified psychiatrists on the medical staff of the hospital, it had been concluded that petitioner was mentally competent to understand the proceedings against him and properly assist in his own defense (R. 5–6).

April 7, 1954, in the furnace room in the basement of the apartment house where she lived (R. 16–19). The janitor's quarters were also in the basement. Petitioner, a half-brother of the janitor, had for some six weeks prior to the time of the rape been living there together with the janitor and his family, which included a wife, two grown sons, and a younger son (R. 77).

At about 5:50 p. m. on the evening of the crime, Mrs. O'Keane went down to the basement to wash clothes (R. 17). When she found a hose so tightly attached to the faucet of the sink that she could not uncouple it, she knocked on the door of the janitor's apartment seeking help (R. 18). Petitioner, who was at the time alone in the apartment (R. 78), responded, detached the hose for her, and reentered the apartment (R. 18). A few minutes later, while in the drying room of the basement, Mrs. O'Keane glanced around to see her assailant, a man with a handkerchief tied over his face (R. 19). She was able to determine only that he was a Negro with bright eyes, that he wore a high, slouch hat, and that he was tall; this general description fitted petitioner and his two nephews (R. 19, 20, 21). When Mrs. O'Keane screamed, she was choked and thrown to the floor. Her next recollection was that of being dragged to the furnace room, where the offense took place (R. 19). She testified that, prior to the time she first saw her assailant, she had heard no one descend the wooden steps which were the only means of entry into the basement from the interior of the apartment house.

Petitioner and one of his two grown nephews left the apartment house shortly after the commission of the crime (R. 83, 111). Petitioner was found and arrested the next day, April 8, at about 2:30 p. m. (R. 21). He was taken to police headquarters, arriving at about 3 p. m. (R. 21). Because the Sex Squad office was being used at this time, petitioner was taken to the Identification Bureau (R. 22) and questioned, according to his testimony,[2] around "30 or 45 minutes, between 30 and 45 minutes" (R. 87). Thereafter, he spent the rest of the afternoon just sitting together with his two nephews in the Sex Squad office at headquarters (R. 47–49, 64, 67, 88, 89). His brother was also present for at least part of the time (R. 87, 88). The three men (petitioner and his nephews) agreed to take lie detector tests at about 4 p. m. (R. 53, 66, 88). While a call went out to locate the officer in charge of the polygraph examinations, food and drink were served to the three (R. 52, 58, 66, 91). Beginning at about 6 p. m., the officer examined the men one after another, the two nephews first (R. 69). Shortly after 8 p. m., the officer began the polygraph examination of petitioner (R. 60, 69). At about 9:30 p. m., petitioner admitted his guilt, expressing remorse (R. 61) and describing in detail what had occurred (R. 70–71). Thirty minutes later, after he had repeated his oral confession to officers of the Sex Squad (R. 32–33, 41), the police attempted, without success, to reach the United States Commissioner in order to ar-

[2] The police fixed the time of questioning as approximately 15 to 30 minutes (R. 25, 58).

raign petitioner (R. 52). At 10:45 p. m., petitioner was, with his permission, examined by the deputy coroner (R. 53). The coroner testified that petitioner was in good physical condition—that there were no marks of injury on his person. The coroner further testified that petitioner told him that he had been treated well—that he felt "O. K." and had no complaints to make except for a slight cold; that he had not been struck or threatened or promised anything other than a fair break; that he had been given food, drink, chewing gum, and cigarettes (R. 54). The coroner further testified that petitioner was alert at the time, and, as far as he could determine, of sound mind (R. 55). After the examination, petitioner was confronted by Mrs. O'Keane, the complaining witness, in whose presence he repeated his confession (R. 27, 33, 42). Between 11:30 p. m. and 12:30 a. m., he dictated his confession to a police department typist (R. 43, 55–57). The typewritten document was introduced in evidence at the trial. It recited that petitioner, upon returning to the janitor's quarters after helping Mrs. O'Keane with the laundry equipment, changed his clothes, tied a handkerchief over his face, went back out into the basement proper, and assaulted her. Petitioner was arraigned on the following morning, April 9 (R. 64).

Immediately after petitioner signed the confession, he told officers, in answer to their inquiry, that the clothing he had worn at the time of the rape was in the janitor's apartment. He offered to take the police there, signed a written statement giving his permission to them to go to the apartment and recover item-

ized articles (R. 34–36), and did in fact accompany them there and point out the garments (R. 43–44).

Petitioner's testimony at the trial disclaimed knowledge of anything that happened on the day of the confession from 6:30 p. m. until the following morning. He attributed this lapse of memory to something put in the food and drink given him (R. 90).

2. The trial judge charged the jury, *inter alia*, that if it found petitioner guilty, it had the function under the statute of determining whether or not the death penalty should be imposed, but that if it did not unanimously agree to such penalty, petitioner would be subject to imprisonment imposed by the court, and that the jury had the right to consider any circumstance or weigh any considerations in reaching a conclusion as to whether the death penalty should or should not be imposed (R. 105). At the conclusion of the general charge, the defense announced it had no objections or requests (R. 106). After the jury had been deliberating approximately five hours, the following occurred (R. 106–107):

> The COURT. Will counsel come to the bench?
> (At the bench:)
> The COURT. I want to show you gentlemen a note that I have received from the jury. I think as to the question they ask on No. 2 I shall have to say that I cannot give them any such assurance.
>
> * * * * *
>
> (In open court:)
> The COURT. Who is the foreman of the jury?
> The FOREMAN. (Juror No. 8) I am.

The COURT. Mr. Foreman, the Court has received your note, which reads as follows:

"Have we other choice of verdicts than these four?

"One, guilty with death penalty;

"Two, guilty as charged;

"Three, not guilty by reason of insanity;

"Four, not guilty."

Now, these four are the only possible verdicts. No other verdict is possible.

Then you go on and ask:

"On No. 2 above: Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release * * *"

I can give you no such assurance. I think I might explain to you that the maximum term the Court can impose is 30 years, but even if the Court imposes the maximum; and of course I can, even if the Court imposes the maximum, the Court also has to impose a minimum sentence. So that the longest term the Court can impose would be an indeterminate sentence of 10 to 30 years. The minimum has to be not more than a third of the maximum. Then at the end of the minimum sentence the Parole Board would have to decide whether the maximum should be served, or anything less than the maximum.

So that I can give you no assurance that the defendant would legally be imprisoned for the remainder of his natural life if he is found guilty as charged.

Now, your last question:

"May the jury have a reading of the D. C. Code re: rape?"

It reads this way:

"Whoever has carnal knowledge of a female forcibly and against her will, shall be imprisoned for not more than 30 years: *Provided,* That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further,* that if the jury fail to agree as to the punishment, the verdict shall be received and the punishment shall be imprisonment as provided in this section."

Have I clearly answered all your questions?

The FOREMAN. Yes, Your Honor.

The COURT. You may retire for further deliberation (R. 106–107).

Twenty minutes later, the verdict of guilty with the death penalty was returned (R. 108).

SUMMARY OF ARGUMENT

I

A. Petitioner's voluntary confession was, in the circumstances of this case, admissible under the *McNabb-Upshaw* rule promulgated by this Court. That rule makes a confession, even though voluntary, inadmissible if made during unnecessary detention prior to bringing the prisoner before a committing magistrate. A crucial element for its application is a finding of unnecessary detention.

What is unnecessary detention cannot be measured in terms of the time element alone but must of necessity depend upon the *reasonableness* of the detention in the light of the circumstances surrounding the cus-

tody and confession in each case. Thus, none of the cases—either those of this Court or the lower courts—have gone so far as to hold that *any* delay in arraignment, *ipso facto,* results in the exclusion of a confession forthcoming during its continuance. Rather, the cases have turned, not only on the length of detention, but upon the purpose behind the detention as well as the manner in which the delay was utilized. Lower court decisions since the *McNabb* and *Upshaw* cases have consistently held varying periods of delay for the purpose of legitimate and proper investigation to be reasonable detention.

A consideration of Rule 5 (a) of the Federal Rules of Criminal Procedure confirms that the reasonableness of the detention under the circumstances of each case is the proper test for determining what is illegal delay that will invalidate a confession. The language of that rule which provides for arraignment after arrest "without unnecessary delay" supersedes statutory provisions containing such language as "immediately" or "forthwith," and indicates that there are situations where some detention before arraignment is inevitable and justified.

The problem is one of balancing the interest of the public in proper law enforcement against the right of the individual suspect to be free from oppressive techniques. Although students of the subject have differed as to where the line should be drawn, there is almost universal agreement that some degree of questioning of persons under arrest is both necessary and desirable, not only for proper law en-

forcement but to guard the interests of innocent persons against victimization by false charges. The courts have looked to the circumstances of each case to determine whether there was reasonable delay consistent with fair police practice.

B. The delay in the instant case was not unreasonable. Petitioner was brought to police headquarters at 3 p. m. and questioned for, at the longest estimate, from 30 to 45 minutes. Thereafter, a delay of approximately 6-½ hours intervened before his confession at 9:30 p. m. The delay was mainly caused by the necessity under the circumstances of this case for talking separately with petitioner and his two nephews before lodging such a serious criminal charge. The congested condition of the police station undoubtedly contributed to this delay but the primary reason was the unavailability of the trained polygraph operator—a delay acquiesced in by petitioner who had agreed to take the lie detector test at 4 p. m., a few minutes after the completion of the initial questioning. By petitioner's own admission, he was not questioned at all after this time until 8:00 p. m., when he reported for the polygraph examination, which consumed 90 minutes. He spent the greater portion of the time of detention just sitting together with his two nephews, eating and drinking, and waiting for the polygraph examination.

The record negates any assertion of unfair police practice indicative of illegal detention. Petitioner was treated with courtesy and consideration. There

was no physical coercion, no prolonged or relay questioning, no holding the prisoner incommunicado.

There was likewise no "psychological pressure" such as denounced by the *McNabb-Upshaw* rule. The lie detector test was given with petitioner's permission; indeed, he expressed a desire to be examined. The examination is not one that would induce an innocent man to confess; if its use occasions any fear, it is a fear of the truth and its consequences. It is recognized by the highest courts of several states as a legal and proper investigative aid that does not render inadmissible a confession otherwise competent. Similarly, there is nothing in the record to show that a "sympathy approach" was used as a device. Nor is it a technique that would cause an innocent man to confess.

The police in this case, we submit, acted throughout with propriety and within the bounds of decent law enforcement.

II

The trial court—properly, we believe—admitted in evidence articles of clothing which were purportedly worn by petitioner at the time of the crime, and which were recovered, with his consent, by police officers. The permission to search was given by petitioner freely and voluntarily, orally and in writing, immediately following his confession. The written permission was signed by petitioner in the presence of witnesses who testified that no promises or threats of any kind were made to petitioner and that he was alert and comprehending at the time.

Petitioner erroneously relies on decisions which find implicit intimidation negating true consent in situations where a suspect is first apprehended by police. In the present case, the consent followed a full confession.

The confession here was voluntary; therefore, the consent was voluntary. The situation is like that in *United States* v. *Mitchell*, 322 U. S. 65, where there was spontaneous consent to search and concession of guilt. The majority and dissent below properly found that petitioner's consent to search, being an immediate accompaniment to his confession, derived color from the confession.

III

The judge also acted within the bounds of propriety when he told the jury, in response to their specific inquiry, that he could give it no assurance that petitioner would be imprisoned for life because of the applicable indeterminate sentence law and the function of the Parole Board. The jury was, under the statute, charged with the duty of deciding whether the death penalty should be imposed. It had the right to base its discretion on the whole law with respect to punishment as well as any other consideration which appealed to it. See *Winston* v. *United States*, 172 U. S. 303.

Since parole laws determine the actual time of incarceration, a jury cannot intelligently impose sentence without a knowledge of them. It is not persuasive to argue that such knowledge might cause the jury, in

an effort to circumvent parole laws, to fix a greater punishment than it might otherwise consider. A sentencing judge may do likewise. Moreover, it is doubtful that a defendant's best interest is served by leaving the jury to apply its own limited knowledge of parole. For this reason, it has even been suggested that the instruction as to parole in these cases should come from the court voluntarily as a part of the general charge, before remarks of counsel or common knowledge give it undue importance in the minds of the jurors.

Some speculation by a jury as to punishment is inevitable; it would appear to be seriously objectionable only where it might influence a jury in reaching a verdict in derogation of the doctrine of reasonable doubt. There was no such danger of confusing the verdict with punishment here. The charge objected to was not made voluntarily before the jury retired to reach a verdict; it could not have beclouded the issue. It came in answer to specific questions which had to be dealt with and which gave every indication that the jury had already disposed of the question of innocence or guilt and was concerned only with the punishment of petitioner. It was responsive, accurate, and objective in character. It was the only logical recourse left to the court.

ARGUMENT

I

PETITIONER'S CONFESSION WAS PROPERLY ADMITTED IN EVIDENCE SINCE THE PERIOD OF DELAY IN ARRAIGNMENT WAS NECESSARY UNDER THE CIRCUMSTANCES IN THIS CASE.

A. THE M'NABB RULE PERMITS REASONABLE DETENTION PENDING INVESTIGATION

This Court in *Upshaw* v. *United States,* 335 U. S. 410, reaffirmed the rule of *McNabb* v. *United States,* 318 U. S. 332, that a confession, although voluntary, is inadmissible if made during unnecessary detention prior to bringing the prisoner before a committing magistrate. It is important at the outset to observe that the rule does not exclude a confession upon the sole ground that it was forthcoming during *any* delay in arrangement. *McNabb, supra,* 318 U. S. at 346; *United States* v. *Mitchell,* 322 U. S. 65.[3] A crucial element for its application is a finding that it was made during *unnecessary* detention. See *United States* v. *Carignan,* 342 U. S. 36.

What is unnecessary detention cannot be measured solely in terms of time of custody before arraignment but must of necessity depend also upon the reasonableness of the detention in the light of the totality of

[3] In *United States* v. *Mitchell, supra,* this Court held that eight days of illegal detention did not destroy the validity of a confession made between arrest and arraignment when the confession was made a few minutes after the suspect's arrival at the police station. The confession, made before the illegal detention had occurred, was found not to have been caused by the detention.

the circumstances surrounding the custody and the confession. Thus, the cases have turned not only on the length of detention, but upon the purpose behind the detention and the manner in which the delay was utilized.

The *McNabb* and *Upshaw* cases stand for the proposition that a prolonged period of detention for the very purpose of extracting a confession constitutes an unreasonable delay, particularly where the period of detention is utilized for extended interrogation. The *McNabb* case was decided on the assumption that the five defendants were detained for periods ranging in time from several hours to several days while being continually questioned for many hours under psychological pressures for the purpose of extracting inculpatory statements. See *McNabb* v. *United States*, 318 U. S. at 341–347; *United States* v. *Mitchell*, 322 U. S. at 67. Likewise, in the *Upshaw* decision, *supra*, the fact that the accused was held for thirty hours "for the very purpose of securing * * * challenged confessions" was deemed indicative of unnecessary delay and thus illegal detention. 335 U. S. at 414.

These decisions do not, however, go so far as to hold that questioning during any period of delay *ipso-facto* results in the outlawing of a confession. In other words, the decisions do not hold, as the dissenting opinion below in this case would hold, that immediately after arrest, without any delay for the purpose of investigation, an accused must be brought before a committing magistrate if one is available. The deci-

sions since *McNabb* and *Upshaw* have quite consistently held that varying periods of delay, sometimes for longer than the thirty-hour period involved in *Upshaw,* were not unreasonable where, under all the circumstances, the delay was utilized, not for the sole purpose of extracting a confession, but for legitimate and proper investigation. *Pierce* v. *United States,* 197 F. 2d 189 (C. A. D. C.), certiorari denied, 344 U. S. 846; *Leviton* v. *United States,* 193 F. 2d 848 (C. A. 2), certiorari denied, 343 U. S. 946; *Haines* v. *United States,* 188 F. 2d 546 (C. A. 9), certiorari denied, 342 U. S. 888; *Patterson* v. *United States,* 183 F. 2d 687, 691 (C. A. 5), 192 F. 2d 631, certiorari denied, 343 U. S. 951.

Thus, the Court of Appeals for the Ninth Circuit, in *Haines* v. *United States, supra,* 188 F. 2d 546, certiorari denied, 342 U. S. 888, held that a period of delay from approximately 10:00 a. m. until the following morning was reasonably necessary in the interest of justice to a suspected counterfeiter being detained to give secret service officers an opportunity to check on information given them by the suspect. During the detention, the suspect made an oral admission, turned over memoranda to the officers, and accompanied them to his "crime laboratory" as well as to the office of the Assistant United States Attorney where he admitted guilt and identified counterfeit notes as his. Later, he signed a written statement. The court pointed out that a rule which would make the timing of a confession the sole consideration, apart from other pertinent factors, would cause confusion

and uncertainty in a variety of circumstances (188 F. 2d at 551).

In the Fifth Circuit, the Court of Appeals in *Patterson* v. *United States, supra,* 183 F. 2d 687, 192 F. 2d 631, certiorari denied, 343 U. S. 951, held that a delay in arraignment of some two and three-quarter hours was not such unnecessary delay as to make inadmissible a confession made during this time. In that case, a suspected forger was taken into custody at 11:15 a. m. He admitted guilt some time between thirty minutes to two hours after his arrival at police headquarters and was arraigned at 2:00 p. m.

In *Leviton* v. *United States, supra,* 193 F. 2d 848 (C. A. 2), certiorari denied, 343 U. S. 946, the defendant was picked up by customs agents investigating export violations at 1:45 p. m. He agreed to accompany them to their office where they arrived at 2:30 p. m. At 3:30 p. m., he was questioned initially for three minutes at which time he told agents where they could find certain files giving important information as to the alleged violations. The agent who went to recover the files did not return until 6:30 p. m. Between 9:20 p. m. and 11:50 p. m., with a fifteen-minute recess, the defendant was questioned formally. He related details of the crime, was detained overnight, and was arraigned at 7:00 p. m. the following day. The Court of Appeals for the Second Circuit held the delay was reasonable in that it was occasioned by the defendant's own readiness to confess and voluntary assistance to the investigating authorities (193 F. 2d at 855).

The same view, despite an earlier intimation to the contrary,[4] is the view that prevails in the Court of Appeals for the District of Columbia Circuit, the circuit in which most of the *McNabb* problems have arisen in recent years.[5] In *Garner* v. *United States*, 174 F. 2d 499 (C. A. D. C.), certiorari denied, 337 U. S. 945, it was held that confessions of murder obtained during the night after one defendant had been detained for a period of from forty-five minutes to an hour and a half, and another for three and one-half hours, were admissible, the detention not being "unnecessary delay." In *Pierce* v. *United States*, 197

[4] In a 1946 decision, *Akowskey* v. *United States*, 158 F. 2d 649 (relied upon by petitioner), the Court of Appeals for the District of Columbia Circuit found that the action of the police, in bypassing committing magistrates to take an accused from the place of arrest to police headquarters where he was questioned continuously for seven hours, was a violation of the *McNabb* rule making his confession inadmissible. The court recognized, however, that "in many instances the circumstances may dictate that some delay ensues between arrest and commitment amounting to one, two or many hours * * *" (158 F. 2d at 650).

[5] There is a division in the District of Columbia Circuit as to whether, even if a confession is made in response to questioning during an illegal period of delay, the confession can be said to be caused by the delay. Compare *Garner* v. *United States*, 174 F. 2d 499, 501–502 (C. A. D. C.), certiorari denied, 337 U. S. 945, with *Allen* v. *United States*, 202 F. 2d 329, 334 (C. A. D. C.), certiorari denied, 344 U. S. 869, and *Pierce* v. *United States*, 197 F. 2d 189, 193, certiorari denied, 344 U. S. 846. See also the opinions in *Rettig* v. *United States*, 239 F. 2d 916 (C. A. D. C.).

That problem is not reached in this case. We do not deny that, on the facts of this case, there may be sufficient evidence of a causal relationship between the detention and the confession. Our position is that there was no unnecessary delay within the meaning of the *McNabb-Upshaw* rule (see *infra*, pp. 129).

F. 2d 189 (C. A. D. C.), certiorari denied, 344 U. S. 846, a robbery suspect confessed at 11:00 a. m.[4] after having been taken into custody at 11:30 p. m. the night before. The Court of Appeals, relying on the reasoning of the Ninth Circuit in *Haines, supra,* concluded that this was not unreasonable detention (197 F. 2d at 194). See also the concurring opinions of Judge Bazelon in *Pierce, supra,* 197 F. 2d at 194, and in *Allen* v. *United States,* 202 F. 2d 329, 335 (where the detention was from noon to 7:30 p. m.).

A similar case recently decided in the District of Columbia Circuit is *Watson* v. *United States,* 234 F. 2d 42.[5] Watson, suspected of murder, was arrested at 6:40 p. m. one evening. He was taken to police headquarters at 7:00 p. m. and commencing at 8:00 was questioned for forty-five minutes. He was questioned again at 11:00 p. m. and produced at a police line-up. There followed intermittent questioning at 12:30 a. m. and a lie detector test at 3:00 a. m. He admitted guilt shortly after 3:15 a. m., completed a full oral confession at 4:00 a. m., and, after sleeping until 7:30 a. m., repeated the oral confession at 8:00 a. m. The court, in finding no unnecessary delay to this point,[6] said (p. 45–46): "Reasonable inquiry was

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[4] Pierce was not arraigned until 4 p. m. on the day of the confession (197 F. 2d at 191).

[5] See also *Billotson* v. *United States,* 231 F. 2d 736, certiorari denied, 351 U. S. 989; *Rettig* v. *United States,* 239 F. 2d 916.

[6] But Watson was not arraigned until two or three o'clock the afternoon of that day. During the intervening time (between 8 a. m. when he repeated his oral confession and time of arraignment) he again narrated details of the crime, was taken to the

appropriate, despite information coming to the notice of the police as a result of which suspicion was fastened upon Watson. 'The police could hardly be expected to make a murder charge on such uncertainties without further inquiry and investigation' [citing 342 U. S. at p. 44]. Before complaint of serious crime is levied, appropriate inquiry is certainly to be permitted, both in the interests of society and of the accused himself, for gross wrong can follow from a charge improperly and improvidently filed against an innocent man."

The reasonableness of the detention as a test of the validity of a confession in the circumstances of each case accords with the language of the Federal Rules of Criminal Procedure. Rule 5 (a), which was in process of formulation when the *McNabb* decision was handed down and which is cited and relied upon in the *Upshaw* decision, provides for arraignment after arrest "without unnecessary delay" (p. 2 *supra*). The wording of the rule, which supersedes the various statutory provisions containing

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scene of the crime for re-enactment and to his apartment to pick up certain clothing in which the police were interested, and was brought back to headquarters to make a written statement. The court found that this further detention was unnecessary delay, pointing out there was no reason at this point to check facts further, it being clear that there was reasonable cause for lodging a complaint. The written confession forthcoming during this time was therefore found to be inadmissible, and the conviction was reversed for this reason. The Government did not seek certiorari from that decision. The Government also did not seek certiorari from the *Rettig* decision, *supra*, note 7.

such language as "immediately" or "forthwith,"[9] quite plainly contemplates consideration of factors other than the length of time required to take a suspect to the nearest committing magistrate.[10] A flexible standard is set up rather than an unyielding rule of exclusion or a rigid specification of maximum time.[11]

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[9] 28 Stat. 416 (1894) prescribed that it shall be the duty "of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the *nearest* circuit court commissioner * * * and *no mileage shall be allowed any officer violating the provisions hereof.*" [Emphasis added.] See also 27 Stat. 609 (1893), imposing this duty in substantially the same language.

20 Stat. 341 (1879) provided that where "any marshal or deputy marshall * * * shall find any person * * * in the act of operating an illicit distillery, it shall be lawful * * * to arrest * * * and take him * * * *forthwith* before some judicial officer * * * *who may reside in the county of arrest* or if none, *in that nearest to the place of arrest.*". [Emphasis added.]

48 Stat. 1008 (1934) authorized officers of the FBI to make arrests and prescribed that "the person arrested shall be *immediately* taken before a committing officer." [Emphasis added.]

These three statutes, cited by this Court in the *McNabb* case, *supra*, are no longer in effect. For a discussion of their legislative history, see Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 Ill. L. Rev. 442, 455–459.

[10] See *The Caviguan Case: A Study of the McNabb Rule*, 42 J. Crim. Law 351, 354; 25 So. Calif. L. Rev. 215; 100 Univ. of Pa. L. Rev. 136, 139.

[11] Some state statutes permit delays in arraignment up to 24 and 48 hours. Missouri Rev. Stats. (1939) § 4346; Calif. Penal Code (1941) § 825.

The formulators of the Uniform Arrest Act suggested that the problem be met by providing for detention, not amounting to arrest, for a period not exceeding two hours, for arraignment within 24 hours after arrest, and for the holding of a suspect for an additional period of 48 hours if a judge so ordered for

As the cases and the literature on the subject indicate, the problem is essentially one of drawing a balance between the public interest in effective law enforcement and the public interest in protecting individuals suspected of crime to be free from oppressive law enforcement techniques. As the Court of Appeals for the Ninth Circuit pointed out in the *Haines* case, *supra*, 188 F. 2d 546, some detention before arraignment is inevitable and almost always desirable for the interests of the prisoner as well as the Government. Often, information believed reliable will be proved erroneous by the questioning of the suspect and the checking of the information supplied by him. He may be spared irreparable damage which would result from the publicity that would follow a charge, supported by what appears to be probable cause, but later found to be ill-advised. A rule of law prohibiting any inquiry without arraignment would seriously hamper law enforcement and would often work to the disadvantage of persons accused of crime.

The problem of just what degree of investigation can be said to be legitimate law enforcement and what goes over into oppressive measures is obviously

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good cause shown. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 339–342, 344, 347.

See also Waite, *Police Regulation by Rules of Evidence*, 42 Mich. L. Rev. 679; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Texas L. Rev. 239, 274–275.

In England, the arraignment statutes contain no express requirement for immediate presentment where there is an arrest pursuant to a warrant, but persons taken into custody without warrants must be arraigned within 24 hours after arrest. Summary Jurisdiction Act, 1879, 42–43 Vict., c. 49, § 38.

not a simple one. It is a matter on which students of the subject have written and differed for years, before and since the *McNabb* rule.[12] It is significant, however, that there is almost universal agreement that some degree of questioning of persons under arrest is both necessary and desirable. Congress gave some thought to the legislation on the subject immediately after the *McNabb* decision (see Hearings before Subcommittee No. 2 of the Committee on the Judiciary, House of Representatives, 78th Cong., 1st Sess.), but the matter has been left to the courts to determine how far they will use their power to exclude evidence to regulate the questioning of arrested persons by law enforcement officers.

We think that the flexible doctrine that has emerged—a doctrine emphasizing the reasonableness of detention in each particular case—is a sound one. As the cases illustrate, there can be no rigid definition of what constitutes necessary or unnecessary delay.

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[12] See, e. g., National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (1931); Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 317–324; Hall, *Law of Arrest in Relation to Contemporary Social Problems*, 3 U. of Chi. L. Rev. 345, 356–357; Fraenkel, *From Suspicion to Accusation*, 51 Yale L. J. 748, 753–758; Waite, *Police Regulation by Rules of Evidence*, 42 Mich. L. Rev. 679, 689–693; Dession, *The New Federal Rules of Criminal Procedure: I*, 55 Yale L. J. 694, 706–714; Berge, *The Proposed Federal Rules of Criminal Procedure*, 42 Mich. L. Rev. 353, 357–359; *Illegal Detention and the Admissibility of Confessions*, 53 Yale L. J. 758; McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 Tex. L. Rev. 239, 270–278; *id.*, *Admissibility of Illegally-Obtained Confessions in Federal Courts*, [1945] Wis. L. Rev. 105; *id.*, *The McNabb Rule Transformed*, 47 Col. L. Rev. 1214; Dorskind, *The Effect of Hobbs Bill on Self-Incrimination and Confessions*, 32 Cornell L. Q. 594.

The period of permissible detention consistent with fair police practice must of necessity depend upon such circumstances as the purpose behind the detention, the number of persons involved in the crime, the reliability of the information upon which an accusation is based, the availability of a committing magistrate, etc. The issue in each case must necessarily be whether under all the circumstances the delay was attributable to reasonable police behavior which did not unduly infringe the rights of the suspect.

B. THE DELAY IN THE INSTANT CASE WAS NOT UNREASONABLE

In the circumstances of the present case, the delay in arraignment was reasonable and necessary. Petitioner was arrested at 2:30 p. m. the day after the crime, and after he was known to have left his home. Petitioner was one of three suspects, the others being his two grown nephews, who lived at the same address. All three fitted the same general description as that given of the perpetrator of the crime (R. 19). All three men, because of residence on the premises and the time element involved, had easy access to the site of the crime (R. 17, 77, 81). Two of them had disappeared after the commission of the crime (R. 111). To have placed such a serious criminal charge against any one of them without a reasonable opportunity for inquiry would have been unwarranted. Not to have sought information from all three under these circumstances would have been a breach of the duty owed by the police to the public to detect and apprehend the person guilty of a serious crime of violence.

Petitioner arrived at police headquarters at 3:00 p. m. and was questioned for 15 to 30 minutes (according to the police, R. 25, 58) or 30 to 45 minutes (by petitioner's testimony, R. 87). Thereafter, the detention of approximately seven hours that ensued before attempted arraignment at 10 p. m.[13] (R. 52, 64) was caused, in most part, by administrative difficulties complicated by the necessity for talking with the three men separately. Undoubtedly, the congested condition of the police station contributed to the delay; there was testimony that the initial questioning took place in the Identification Bureau because the Sex Squad office was busy at the time (R. 22). However, the prime reason for delay was the unavailability of the trained polygraph operator—a delay that had at least the tacit approval of petitioner, for he had agreed to take the polygraph examination at 4:00 p. m., a few minutes after the completion of the initial brief questioning (R. 53). The examiner,[14] who was not available until 6:00 p. m., and who did not see petitioner until 8:00 p. m. (having questioned his two nephews first), questioned petitioner for only an hour and one-half (R. 59, 60). The remainder of the time petitioner spent together with one or both of his two nephews, just sitting, eating, and drinking while

[13] Petitioner's confession was made at 9:30 p. m. and reduced to writing between 11:30 p. m. and 12:30 a. m. (R. 56, 61, 70). He was arraigned on that morning (R. 64).

[14] In this regard, it should be stressed that proper administration of a lie detector test requires the services of a specialist with training and skill in conducting the examination and making a a diagnosis. See Inbau, *Lie Detection and Criminal Interrogation* (3d ed.), pp. 114, 116.

waiting for the polygraph examination (R. 88–90). By petitioner's own testimony, he was not questioned during that time (R. 89). Here then, there was no detention of a single suspect for the primary purpose of eliciting a confession from him, or any other indication of calculated non-compliance with the requirement of arraignment without unnecessary delay. Instead, there was detention for the legitimate purpose of checking on the information given by one of three persons reasonably suspected of having committed a serious crime.

The record negates petitioner's assertion of unfair police conduct indicative of an illegal detention. Petitioner was treated with courtesy and consideration. It is conceded that there was no physical coercion (R. 97). He was given food and drink (R. 90). There was no prolonged or relay questioning. By the testimony most favorable to petitioner, he was questioned for only thirty to forty-five minutes initially (R. 87), and later for an hour and one-half pursuant to the polygraph examination which he voluntarily took, or a total time of no more than two and a quarter hours in two separate sessions.

Petitioner was not held incommunicado. When he was first brought to the police station, he was taken to a room with his brother and his nephews (R. 87). As already pointed out, at least part of the initial questioning of petitioner took place in the presence of his brother and his nephews (R. 29, 87). He agreed to take the lie detector test in the presence of his nephews (R. 65, 66, 88). From about 3:45 p. m. until 8:00 p. m., petitioner sat in the Sex Squad office

with one or both of his nephews (R. 47–49, 64, 65, 67, 88, 89). He was not held in a cell or secreted in a back room. His relatives had knowledge of the situation, and either he or they could have sought counsel if desired. There is no indication in the record that the police sought to keep his detention a secret or to prevent him from communicating with persons outside the police station.

Moreover, however, as pointed out above (*supra*, p. 5), he took the polygraph examination voluntarily; no one compelled his submission to it. See *Tyler* v. *United States*, 193 F. 2d 24, 29 (C. A. D. C.), certiorari denied, 343 U. S. 908. Indeed, there was testimony that he indicated a desire to take the test, even signing a statement to that effect, in order to prove his innocence (R. 61). In any event, there is nothing so formidable about the appearance of a polygraph machine that would induce an innocent person to confess to a crime. The conventional apparatus consists of a blood pressure cuff of the same type used by physicians, a pneumograph tube which when fastened on the chest measures changes in respiration, and a small electrode unit attached to the hand which records skin reflex. See Inbau, *Lie Detection and Criminal Interrogation* (3d ed) pp. 5–8; see also R. 74. It is a matter of common knowledge that the purpose of the machine is to detect deception. The success of its use depends upon pre-test instruction as to procedure; the person being examined knows at the outset that the experience involves merely the answering of questions. See Inbau,

supra, p. 11. If its use occasions any fear, it is not a fear of the machine but a fear of the truth and its consequences. This is not the "psychological pressure" denounced by the *McNabb-Upshaw* doctrine. Neither is it such pressure that would make a confession "untrustworthy," the standard used by this Court prior to the formulation of the *McNabb* rule.[15] The use of the lie detector has been recognized as a legal and proper investigative aid. The highest courts of several states have held that the technique does not render inadmissible a confession otherwise competent.[16]

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[15] See *Wilson* v. *United States*, 162 U. S. 613; *Brown* v. *Mississippi*, 297 U. S. 278.

[16] *Commonwealth* v. *Hipple*, 333 Pa. 33, 3 A. 2d 353; *State* v. *Collett*, 144 Ohio St. 639; 58 N. E. 2d 417; *State* v. *DeHart*, 242 Wis. 562, 8 N. W. 2d 360; *People* v. *Hills*, 30 Cal. 2d 694, 185 P. 2d 11. See also *Commonwealth* v. *Jones*, 341 Pa. 541, 19 A. 2d 389; *State* v. *Lowry*, 163 Kan. 622, 628, 185 P. 2d 147, 151; *Henderson* v. *State*, 230 P. 2d 495 (Okla. Cr. App., (1951); *Pinter* v. *Satte*, 203 Miss. 344, 34 So. 2d 723.

In the *Hipple* case, *supra*, the defendant had confessed to a murder after having been given a lie detector test. He objected to the admissibility of the confession because the instrument had been used and because he had been told by the investigating officers that "[y]ou can lie to us but you cannot lie to this machine." [p. 39] In upholding the trial court's ruling in admitting the confession, the Pennsylvania Supreme Court held that, since no promises, force, or threats had been employed in obtaining it, the mere use of the instrument did not render the confession inadmissible. The court also stated that, even if the officers' comments regarding the defendant's inability to "lie to th[e] machine" could be considered a trick, that fact alone would not nullify the confession, because of the general rule pertaining to confessions procured "by a trick or artifice, not calculated to produce an untruth * * *." [p. 39]

Nor is there anything in the record to show that "sympathy" was used as a device to induce a confession. At trial, when the polygraph operator was asked if his sympathy for petitioner was a device, he replied, "I was sorry for him now, then, and I am now. And it was sincere" (R. 76). But even if the approach had been a device, it would not have nullified a confession obtained through its use. It is not a technique which would be apt to induce an innocent man to confess to a crime he did not commit. See Wigmore, *Evidence,* (3d ed.) § 841; Inbau, *supra,* pp. 195–197. See also *Jackson* v. *United States* 102 Fed. 473, 483 (C. A. 9); *Lewis* v. *United States,* 74 F. 2d 173, 177 (C. A. 9) This Court has recognized that greater deception, such as the use of a decoy, is a proper means of law enforcement. *Sorrells* v. *United States,* 287 U. S. 435, 441–442. Inducing a person by kindly means to tell the truth is hardly inconsistent with fair procedure.

Petitioner stresses the fact that the psychological examinations during the insanity proceedings show him to be a person of low mentality. But the police can hardly cease to investigate a crime because the suspect is of low mentality (assuming, what is not shown here, that the police could have known at the time that petitioner's mentality would be found to be low).[17] So long as the police behaved with propriety, in accordance with civilized standards, they cannot be said to have been derelict in their obligations because a more acute mentality might have made their task of detection more difficult.

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[17] The police testified that petitioner appeared to be alert and comprehending (R. 69).

Here, we submit, the police acted well within the limits of decent law enforcement. There was no unreasonable delay for the sole purpose of extracting a confession. There was delay for the legitimate purpose of checking on the stories of three persons, all of whom were reasonably suspected of having committed a serious crime. There was no harsh treatment, no holding petitioner incommunicado, no undue pressure of any kind. There was in fact courteous and considerate treatment. Such conduct does not overstep the bounds of proper law enforcement and does not require the exclusion of a confession which was manifestly voluntary.

II.

EVIDENCE OBTAINED THROUGH A SEARCH MADE WITH PETITIONER'S CONSENT AFTER HIS CONFESSION WAS PROPERLY ADMITTED

Petitioner contends that the trial court committed error in admitting into evidence articles of clothing worn by him at the time of the crime and recovered, with his consent, by police officers. After he had confessed, petitioner gave permission for the search, orally and in writing (R. 35). The written statement was signed by petitioner (R. 35–36) and witnessed by officers who testified at the trial that no promises or threats of any kind were made to petitioner, that his consent was given freely and voluntarily, and that he was alert and comprehending at the time (R. 35, 44). The court below therefore found the consent to have been given without duress or coercion (R. 115). It was "unequivocal and specific" and freely and in-

telligently given. See *Karwicki* v. *United States,* 55 F. 2d 225, 226 (C. A. 4); *Kovach* v. *United States,* 53 F. 2d 639 (C. A. 6).

Petitioner relies on two District of Columbia decisions, *Judd* v. *United States,* 190 F. 2d 649, and *Higgins* v. *United States,* 209 F. 2d 819, holding that consent to search, given at a time when the suspect was first apprehended by police officers, could not be deemed a true consent since intimidation and duress were implicit in the circumstances. But there is a vast difference between consent given while under arrest at a time when the defendant is denying (or at least not admitting) guilt and consent given after the accused has made a full confession of his crime. In the latter situation, which is the situation here, the consent to search is really an extension of the confession, and is motivated by the same psychological factors, inducing disclosure and expiation, that motivate the confession. If the confession was voluntary, as seems clear irrespective of its admissibility under the *McNabb* rule, the consent to the search was equally voluntary.

Both the majority and dissent of the court below, relying on *United States* v. *Mitchell,* 322 U. S. 65, agreed that, as petitioner's consent was an immediate accompaniment to his confession, it "derives color from the confession" (R. 115, 118). The situation here is similar to that in *Mitchell, supra,* where the Court said at 322 U. S. 65, 70: "Here there was no disclosure induced by illegal detention, no evidence was obtained in violation of any legal rights, but instead the consent to a search of his home, the prompt

acknowledgment by an accused of his guilt, and the subsequent rueing apparently of such spontaneous cooperation and concession of guilt." Although here petitioner's cooperation may have been somewhat less spontaneous than in *Mitchell,* the reasoning of that case applies. The consent and confession are so interrelated that the test of voluntariness must be the same. It was the confession, and not the arrest, which induced the consent. The voluntariness of the confession thus establishes the voluntariness of the consent.

III

THE JURY, CHARGED WITH DISCRETION UNDER THE STATUTE IN DETERMINING PUNISHMENT, WAS PROPERLY INFORMED OF THE LAW ON THE SUBJECT

Petitioner argues that the trial judge committed reversible error by his answer to a specific inquiry from the deliberating jury as to whether he could assure them that petitioner would be imprisoned for life. After stating that he could give no such assurance, the trial judge explained that any sentence imposed by him must conform to certain maximum and minimum standards, and, at the end of the service of the minimum term, would be subject to the review of the Parole Board. We believe that the judge, faced with the inquiry, was obliged to do exactly what he did—give the jury a correct, sober, objective reply to its question.

The District of Columbia statute under which petitioner was convicted permits a jury to add to its verdict a provision for the death penalty, "in which case the punishment shall be death by electrocution

* * *." 22 D. C. Code § 2801 (1951) (*supra*, pp. 2, 3, [redacted]). Thus, the statute gives the jury the power to sentence, although the penalty is loosely referred to as a part of the verdict. The desirability of this type of legislation has been a subject of wide discussion,[18] but the fact is that a vast number of statutes do vest the jury with discretion in imposing punishment. These statutes include provisions ranging in degree from the grant of authority to recommend mercy in an advisory or mandatory capacity to the grant of authority to fix the quantum of punishment, varying from a term of years within specified limits to the mandatory death penalty. See, for example, Ala. Code Ann. (1940) Title 15, § 335; Ill. Rev. Stat. (1947) c. 38, § 754a; Cal. Pen. Code (1941) § 190; Fla. Stat. 1941 § 919.23 (1), (2). Compare 18 U. S. C. 1111, 1201.

In cases arising under these statutes, it is of course inevitable that the jury will engage in a certain amount of speculation as to punishment, including

[18] See Comment, 17 U. of Chi. L. Rev., 400, 408, where it is argued that, as between court and jury, punishment should be kept within the exclusive power of the court because: (1) the court is less likely to limit the parole board's discretion as to when a particular prisoner should be released; (2) determination of punishment by juries is contrary to the rule of reasonable doubt; (3) the imposition of punishment requires some knowledge of the defendant's background and character.

See also Williams, *Jury Discretion in Murder Trials*, 17 Mod. L. Rev. 315, (which discusses a proposal made by Great Britain's Royal Commission on Capital Punishment to entrust to the jury after a conviction in capital cases discretion to decide whether there are any extenuating circumstances which make it undesirable that the capital penalty should be imposed).

speculation as to possible alternative punishments. Nor is such speculation—at least under federal law—necessarily beyond the jury's province. Where Congress has seen fit to entrust the jury with the responsibility of punishment, the jury has the right to base its discretion on the law on that subject as well as any other consideration which appeals to it. This is the reasoning of this Court in *Winston* v. *United States*, 172 U. S. 303, where, in a decision holding that the authority of a jury to decide against capital punishment in a federal prosecution for murder was not limited to cases of palliating or mitigating circumstances, it was said (p. 313):

> * * * The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

See also *Tatum* v. *United States*, 190 F. 2d 612 (C. A. D. C.). Flatly inconsistent with this rationale is petitioner's contention (Pet. Br. 21) that the jury, in inquiring about the possibility of alternative punishments, "were concerning themselves with matters that were totally irrelevant to their function." As the *Winston* decision shows, it is the very essence of the jury's function in such cases to weigh all factors in determining whether the death penalty should be imposed.

And if the jury's consideration of alternative punishments does not constitute reversible error, surely neither does the jury's *knowledge* as to alternative punishments. It can hardly be contended that the jury's consideration of the matter must be uninformed. More specifically, since parole laws determine the actual amount of time a defendant will remain incarcerated, a jury charged with the imposition of sentence is entitled to correct information concerning such laws. This is the view of the majority of state decisions which have reasoned that punishment cannot otherwise be intelligently imposed.[19] This view has additional support from the fact that most state courts have held it is not prejudicial error for the prosecuting attorney to mention

[19] *State* v. *Burth*, 114 N. J. L. 112, 176 Atl. 183; *Liska* v. *State*, 115 Ohio St. 283, 152 N. E. 667; *Massa* v. *State*, 37 Ohio App. 532, 175 N. E. 219; *State* v. *Mosley*, 102 N. J. L. 94, 131 Atl. 292; *State* v. *Schilling*, 95 N. J. L. 145, 112 Atl. 400; *State* v. *Martin*, 94 N. J. L. 139, 109 Atl. 350; *State* v. *Carrigan*, 93 N. J. L. 268, 108 Atl. 315; *State* v. *Rombolo*, 89 N. J. L. 565, 99 Atl. 434. See also 90 U. of Pa. L. Rev. 221, noting *Sukle* v. *People*, 107 Colo. 269, 111 P. 2d 233; 51 Harv. L. Rev. 353, noting *State* v. *Carroll*, 52 Wyo. 29, 69 P. 2d 542.

the possibility of parole in his argument before the jury.[20].

In opposition to this majority view, it has been urged that it is improper for a court to "encourage" jury speculation on what an administrative officer "apart from the law under which the judiciary proceeds" might do in the future, since the jury is likely to fix a greater penalty than they otherwise might have considered.[21] The argument that a jury, armed with knowledge of parole after service of a minimum sentence, might, in an attempt to circumvent the parole or indeterminate sentence statutes at a future date, fix a greater penalty than it might otherwise normally impose, is not persuasive. A sentencing court likewise has that power.[22] Moreover, a defendant's interest is surely not served best by leaving the jury to apply its own limited knowledge of

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[20] *Underwood* v. *Commonwealth*, 266 Ky. 613, 99 S. W. 2d 467; *Sullivan* v. *State*, 47 Ariz. 224, 55 P. 2d 312; *Glenday* v. *Commonwealth*, 255 Ky. 313, 74 S. W. 2d 332; *State* v. *Stratton*, 170 Wash. 666, 17 P. 2d 621; *People* v. *Murphy*, 276 Ill. 304, 114 N. E. 609; *Hillen* v. *People*, 59 Colo. 280, 149 Pac. 250; *Jacobs* v. *State*, 103 Miss. 622, 60 So. 723; *Wechter* v. *People*, 53 Colo. 89, 124 Pac. 183; *State* v. *Junkins*, 147 Iowa 588, 126 N. W. 689. *Contra: State* v. *Johnson*, 151 La. 625, 92 So. 139.

[21] *Sukle* v. *People*, 107 Colo. 269, 111 P. 2d 233; *Houston* v. *Commonwealth*, 270 Ky. 125, 109 S. W. 2d 45; *Bean* v. *State*, 58 Okla. Cr. 432, 54 P. 2d 675; *Postell* v. *Commonwealth*, 174 Ky. 272, 192 S. W. 39, *Gaines* v. *Commonwealth*, 242 Ky. 237, 46 S. W. 2d 75; *State* v. *Dooley*, 89 Iowa 584, 57 N. W. 414; *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797.

[22] In a number of cases, moreover, the death penalty has been imposed by a jury where the court has refused the jury's request for instruction concerning parole. *Krull* v. *United States*, pending on petition for a writ of certiorari, Nos. 556 and 557 Misc., this Term; *Gaines* v. *Commonwealth*, *supra*; *State* v. *Dooley*, *supra*.

parole. It is for this reason that it has been suggested that instruction as to parole is not only proper, but it is also advisable, and that it should come from the trial judge at the time of his charge, before speculation based either upon remarks of counsel or common knowledge of parole methods gives it undue importance in the jury's mind.[23] This view is in accord with this Court's *Winston* decision (*supra*), emphasizing the broad discretion of federal juries in determining whether a death penalty should be imposed.

As petitioner points out (Pet. Br. 22), the question of the propriety of instructing a jury as to the law of parole has been decided in only one federal case, *Lovely* v. *United States*, 169 F. 2d 386, 391 (C. A. 4). There, the trial judge in his general charge stated that a person sentenced to life imprisonment was eligible to parole after fifteen years. The Court of Appeals for the Fourth Circuit found this to be prejudicial error, reasoning that the jury had nothing to do with the defendant's punishment except to decide whether he should be given capital punishment, and that the charge as given beclouded the issue and opened way to a compromise verdict. The court relied upon two cases, neither of which, we think, is in point. *Ryan* v. *United States*, 99 F. 2d 864 (C. A. 8), certiorari denied, 306 U. S. 635, and *Coward* v. *Commonwealth*, 164 Va. 639, 178 S. E. 797. In the *Ryan* case, involving a prosecution for conspiracy to injure persons in the exercise of civil rights, the jury

[23] See *State* v. *Carrigan*, 93 N. J. L. 268, 108 Atl. 315; 90 U. of Pa. L. Rev. 221, 222; 51 Harv. L. Rev. 353, 354.

had nothing at all to do with punishment but only the duty to decide guilt; the court merely stated that it disapproved of the practice of permitting a detailed discussion of the extent of punishment in the argument and of indulging in a discussion in the instructions of the punishment that may be anticipated in the event of conviction. *Coward* v. *Commonwealth* represents the minority—and, we think, less persuasive—view among the State courts (see *supra*, p. 37); oddly enough, this decision, while holding that it is error for the court by its instructions (or for counsel in argument) to tell the jury that its sentence might be cut down by some other arm of the law, states that the error is harmless in murder cases where the sentence is death (718 S. E. at 799).[24]

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[24] A somewhat similar question was recently presented in the Court of Appeals for the Fifth Circuit. *Krull* v. *United States*, No. 15997, January 4, 1957, pending in this Court on petition for a writ of certiorari, Nos. 556 and 557 Misc., this Term. In that case, the trial court refused to answer the jury's inquiry as to parole and warned it against consideration of the matter. The jury directed the imposition of the death penalty. On appeal, the defendant complained of the remarks made by the trial court in attempting to divert the jury's attention from the question of parole. The Court of Appeals held that under the rape statute involved in the case (18 U. S. C. § 2031) the jury did not have the power to impose the death penalty, and thus rendered unnecessary any decision on "the question as to whether the court's comment and further instruction were prejudicial error." (Slip opinion, p. 29.) Nevertheless, the *Krull* case is significant for its demonstration of the futility of dealing with a jury's inquiry as to parole in any way other than by a reasonably complete answer. The colloquy among the court, counsel, and the foreman of the jury (see slip opinion, pp. 25–27) illustrates the confusion that can result when a court attempts to circumvent the issue.

Speculation by a jury as to punishment would appear to be seriously objectionable only where it might conceivably influence a verdict in derogation of the doctrine of reasonable doubt—where, for example, a jury in a doubtful case might be persuaded to agree to a verdict of guilty under a belief that an advisory recommendation of mercy would affect a sentence.[25] But where there is not this danger of confusing the verdict with the punishment, and where the jury is given by statute the duty of fixing a mandatory punishment within its discretion, it is difficult to see how a jury can intelligently impose a sentence without full knowledge of the quantum of punishment involved. Regardless of whether the primary purpose of punishment is one of retribution, reform, or the protection of the public, a knowledge of length of incarceration is necessary.

In the instant case, the comments of the judge relative to sentence and parole could not have in any way influenced the jury in making its determination as to petitioner's guilt or innocence. The comments were

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[25] See Comment, 17 U. of Chi. L. Rev. 400, noting *Warford* v. *State*, 214 Ark. 423, 216 S. W. 2d 781. It should not be assumed, however, that jurors would thus disregard their oaths. See *United States* v. *Krulewitch*, 167 F. 2d 943, 950 (C. A. 2), reversed on other grounds, 336 U. S. 440; *United States* v. *Parker*, 103 F. 2d 857 (C. A. 3), certiorari denied, 307 U. S. 642. It is impossible to predict in a given case to what degree such speculation might protect rather than threaten a defendant's rights. For example, where a law requires a heavy sentence, and the jury knows it, there will be a greater likelihood of acquittal. See Comment, 17 U. of Chi. L. Rev., *supra*, at 405, fn. 20.

not made voluntarily as a part of the general charge before the jury retired to reach a verdict, as in *Lovely* v. *United States, supra,* 169 F. 2d 386 (C. A. 4);[26] they could not therefore have had the initial effect of beclouding the issue. Moreover, there is every reason to believe, from the tenor of the questions asked by the deliberating jury, that the jury had already disposed of the question of guilt or innocence and was then concerned only with punishment.

The jury undoubtedly wished to make certain that at no future date would petitioner be released into society. This was the result it thought just and

[26] State decisions make a distinction between information volunteered in the charge and information responsive to a query. *Jones* v. *State*, 161 Ark. 242, 255 S. W. 876; *Freeman* v. *State*, 156 Ark. 592, 247 S. W. 51; *State* v. *Carroll*, 52 Wyo. 29, 69 P. 2d 542. In *State* v. *Carroll*, *supra*, it was said (69 P. 2d at 563): "A voluntary statement on the part of the trial court referring to the power of the Board of Pardons, or to the pardoning power of the Governor, might make the jury believe that the statement has been made for the express purpose of calling such power to their attention and thus might have a tendency to influence them in their verdict. Such voluntary statement should, accordingly, not be made, although, as already shown, some of the cases do not find it objectionable. We are not, however, able to perceive how any good purpose can be subserved by refusing to answer an inquiry of the jury. It would leave them in confusion and doubt, which would just as likely react against the accused as in his favor. We find that at least in some cases courts, in passing upon the point whether or not the trial judge should have made a statement to the jury, have pointed out that it was made in response to an inquiry, evidently deeming that of some importance. *Freeman* v. *State*, 156 Ark. 592, 247 S. W. 51; *Jones* v. *State*, 161 Ark. 242, 255 S. W. 876. While the jury may not know the details of reprieves, pardons and paroles, they, along with all ordinarily informed men, have a general knowledge of the subject."

proper. Under the statute, this result could of course be brought about by imposition of the death penalty, a matter left by Congress within the jury's discretion. But, possibly motivated by consideration for petitioner, the jury asked, in effect, if there was an alternative punishment which would accomplish the result it thought proper with less severity. It asked (*supra*, p. 8): "Can we the jury be assured that the defendant legally be imprisoned for the remainder of his natural life? No possibility of release * * * May the jury have a reading of the D. C. Code re: rape?"

The judge in his reply rigidly confined himself to stating concisely the law with respect to punishment for the crime. His answer was responsive, accurate, and objective in character. He stated simply that he could give no assurance that the defendant could, if found guilty, be imprisoned for the rest of his natural life. He explained that an indeterminate sentence was required, that the minimum term could be no more than a third of the maximum, that the maximum sentence was 30 years, and that at the end of the minimum sentence the Parole Board would have to decide whether the maximum or anything less should be served. Then, pursuant to the jury's request, he read the provision of the District of Columbia Code under which petitioner was being tried. The judge thus gave the jury the whole law with respect to the punishment for the crime without special emphasis of any kind.

We do not believe he could have done otherwise. As already pointed out, the jury's inquiry was one that had to be dealt with. And an answer without

explanation—for example, "I can give no such assurance"—or a refusal to answer at all would not have altered the situation.[27] Indeed, such a recourse could have caused confusion which the court might well have concluded would work to the prejudice of petitioner.[28]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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[27] See the Fifth Circuit decision in *Krull* v. *United States* (*supra*, note 24); *Gaines* v. *Commonwealth*, 242 Ky. 237, 46 S. W. 2d 75; *State* v. *Dooley*, 89 Iowa 584, 57 N. W. 414.

[28] Petitioner made no objection to the court's instruction and suggested no alternative or supplemental charge. In a similar situation, where counsel made no objection to a court's indication that it would answer affirmatively a deliberating jury's inquiry as to whether it could recommend clemency, the failure of the judge to indicate that the jury's recommendation would not be binding has been held not to be plain error that would be noticed although not brought to the attention of the trial court. *United States* v. *Krulewitch*, 167 F. 2d 943, 950 (C. A. 2), reversed on other grounds, 336 U. S. 440; see Rules 30, 51, 52 (b), Federal Rules of Criminal Procedure.

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